EQUITY CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
NORTH-CAROLINA.

DECEMBER TERM, 1831.

Thomas Compton *et ux.* v. William Culberson & Samuel Greer.

Upon a bill to correct a settled account for specified errors, such errors only can be corrected as arose from fraud or mistake; and the plaintiff cannot surcharge and falsify, as to an item of the account assented to at the settlement with a full knowledge of the facts.

And where the bill also sought to set aside the settlement as obtained by undue influence, it was held that the plaintiff by consenting to a reference of the account upon the basis of the settlement, with liberty to surcharge and falsify, had waived the relief sought upon the ground of undue influence.

The original bill was for an account of the estate of the intestate *Samuel Greer*, and was filed in 1818, by *Thomas Compton* and his wife, a daughter of the intestate, and by him as administrator of two others of the children who were dead, against *William Culberson* and *Samuel Greer jun.* the former of whom was administrator in conjunction with *Margaret Greer*, the widow of the intestate, and the latter the son of the intestate, and the executor of his mother *Margaret*. It charged that a considerable estate came to the hands of the widow and her co-administrator in 1790, when the intestate died; of which an account and distribution were sought. It was charged, that although the children lived with their mother, they maintained themselves by their own labor, and therefore ought to have interest on their shares—that the

Dec. 1831.

Compton v. Gaeer.

administrators bought several articles at their own sale at an under value—that the administrators having returned a false and fraudulent account current to the County Court, in which they did not charge themselves with interest, nor with several sums which came to their hands, and which were specified, pretended to come to a settlement in 1809, with the children, upon the basis thereof, and then paid to each of them $220, as their respective shares without allowing interest, which the children, being young and unacquainted with their rights and with accounts, accepted. The prayer was for a general account.

Answers were put in to this bill, admitting one of the mistakes and denying the others alleged, and insisting that the children were fully paid after correcting that mistake; and also that the youngest of the children was in 1809 twenty-five years of age, and that the items of the account were perfectly understood, and assented to by them all, and particularly the omission of interest, which was not brought into account on either side, because the family had lived together and been supported out of the profits. As to the allegation that the administrators had purchased at their own sale at an under value, the answer stated that the purchases were at fair prices, which were brought into account and fully assented to by the children. And it then set forth a settlement in 1809, on which the shares were ascertained and paid; and averred that it was fair and proper; and that thereupon each child, with a full knowledge of all the facts, gave to the administrator receipts and acquittances in full, which were relied on as a bar to further accounting, in the same manner as if pleaded.

An amended bill was filed in 1820, in which further specific errors in the settlement were pointed out, for which, together with the former, it prayed that the settlement might be opened. And it was further charged, in reference to the assent given, as stated in the answers, by the children to the omission of the interest, and the confirmation of the purchases of the administrators, that such assent was not freely given, but was obtained by

their mother by undue influence, and by uncandid insinuations that her daughters would lose nothing by settling upon the footing desired by her, saying that she was old and infirm, and that her children ought not to break up her peace or be hard with her, for she could not live long, and then they would have amongst them all she had, thereby intending they should understand, that at her death her estate would be equally divided. That moved by their mother's appeal, and in faith of her declaration of a future equal division, the daughters came to the settlement, and executed the acquittances. But she afterwards gave her whole estate by will to her son, the defendant. And the prayer was, that the acquittances might be set aside as unduly obtained, and the parties come to a new account; or at any rate, that the settlement might be corrected in the matter of the errors pointed out, and particularly the interest.

The answer to the amended bill denied all other errors; and admitted that the intimation was given by the mother about the future disposition of her own estate, or to the effect charged; but denied that it was intended or understood as an engagement, or otherwise than as matter of maternal bounty then in her mind, or that it was intended to overawe or buy off the children from prosecuting their demands. That in all probability the purpose then expressed would have been fulfilled, but for subsequent changes in the situation of the family. That of her three children then living one afterwards died; another intermarried with the plaintiff *Thomas*, who was in easy circumstances, and treated his mother-in-law with extreme harshness, which induced her to bestow all her estate on the defendant, who continued to live with her. This answer also concluded by relying on the settlement as a fair one, and the acquittances as a bar.

Much evidence was taken to every point of the case; which it is not necessary to state, as the decision did not turn on it.

A reference was made as upon the hearing, by consent of the parties, to the master to take the accounts of the estate upon the basis of the former accounts, with liber-

Dec. 1831.

Compton v. Greer.

ty to the plaintiffs to surcharge and falsify; and upon that the master reported, that the plaintiffs were overpaid by the sum of £1 15 4, after correcting all the specified mistakes; unless interest was to be charged, and he submitted that question to the court.

Nash, for the plaintiffs.

Badger, for the defendants.

Ruffin, Judge, after stating the case as above, proceeded as follows: The cause comes on now upon the matter referred by the master to the decision of the court, and for further directions. It has been argued at large for the plaintiffs upon the evidence, and the rule of this court touching the dealings between parents and children, and settlements between guardian and ward.

The court would examine the case upon those points, both as to the facts and the law, were the cause open for a decision in favor of the plaintiffs, on the score of that settlement being unduly obtained. But it is not. The acts of the parties in making the special reference preclude us from going into that subject.

It is manifest that the grounds of the two kinds of relief sought are entirely different, as the two kinds of relief are in themselves distinct. The one is, to open a settled account on the score of specific errors—a relief to which all persons, in every relation of life, are entitled, and which depends merely upon showing errors made either thro' fraud and imposition, or by mistake or accident. The settlement stands as right, except as to the particular errors pointed out, and having their origin in either of those causes. There is no accident alleged in this case. So far as this point is concerned, the question turns upon the false charges fraudulently made by the administrators, and the fraudulent omission of interest. But there can be no fraud, in the sense of that term applicable to this subject, nor mistake where the parties knew all their rights, and all the facts, and were perfectly aware of the omission, and gave an express assent to it. When they come to surcharge and falsify, how can they do it as to an item absolutely agreed to at the settlement?

But the other relief prayed is much broader. It is to set aside the whole settlement, and open the case to an account *de novo*, not only upon the ground that errors exist, and the party is deprived of rights, but upon the additional ground of a higher and different species of fraud; that the party was in a situation which put him in the other's power; that he was in a condition to be worked upon, and induced to take less than he was entitled to, and knew he was entitled to, and that advantage was taken of that influence, and he unduly prevailed on to surrender his rights without a consideration. Then the knowledge of his rights does not negative the fraud. It only proves it the clearer; because it shows the extent of his weakness, and of the other's control over him, and the iniquitous use made of it. A settlement made under those circumstances concludes nothing, and receipts in full given under it only stand as acquittances for the sums actually paid. Far otherwise is it on a bill to surcharge and falsify. There the receipts do stand as conclusive until errors are pointed out, and the account is opened only as to them. And those errors must be shown not to have been known and assented to at the settlement, or some concealment on the one part, or misapprehension of *the facts touching the item of account*, on the other.

Here the item of interest was known, discussed and given up by the children. They knew of their right, and they knew they were not to get it in that settlement. How then can it be said, there was any mistake or imposition upon the point of excluding the charge of it? Whether they were fairly induced to relinquish it is another question. But that question is beyond our reach; because the plaintiffs have agreed to overrule that part of the relief prayed, by having the accounts taken on the basis of the former account—thereby trusting the decision of their ability to show actual mistakes, thro' ignorance, or accident, or fraudulent misrepresentation, or concealment. None such have been made to appear; and therefore the bill must be dismissed with costs.

PER CURIAM.—BILL DISMISSED.

Dec. 1831,

William Cooper *et al.* v. Hardy Pridgeon *et al.*

Where a testator devised personal estate to a child, "to her and her "heirs forever," and added "it is my will and desire, that if my said "daughter lives to arrive to the age of eighteen years, for her to re- "ceive her said legacy, and take possession of it; and if she should "die without a lawful heir begotten of her body, then the said pro- "perty to revert back, and be equally divided" &c. it was held that the words "receive and take possession" were equivalent to "shall then be paid," and that the legatee took a vested, and (the limitation over being too remote) an absolute interest.

The bill which was filed in Nash, in 1831, set forth the following clause of the will of *David Pridgeon*:

"I give and bequeath to my daughter, *Polly Harriet* "*Pridgeon*, one tract of land, &c.; also one negro boy "&c.; also six hundred dollars in cash, to her and her "heirs forever. It is my will and desire, that if my "said daughter, *Polly Harriet Pridgeon*, lives to arrive "to the age of eighteen years, for her to receive her said "legacy that I have left to her, and take possession of "it; and if she should die without a lawful heir begot- "ten of her body, then the said property to revert back, "and be equally divided between my two sons *Hardy* "and *Abijah Pridgeon* and my daughter, *Cloe Atkinson*."

Polly Harriet Pridgeon died under the age of eighteen, unmarried and without issue, and the administration of her estate was committed to the defendant *Hardy*.

The plaintiffs were her next of kin, and sought distribution of her personal estate.

The case made by the bill was admitted in the answer.

No counsel appeared for the plaintiffs.

Badger, for the defendants, argued that the word *if* in this will was a word of condition, and imported a contingency which must happen before the estate vested; and cited *Hanson* v. *Graham*. (6 *Ves.* 238.) *Goodtitle* v. *Whitby*. (1 *Bur.* 228.) *Doe* v. *Lea*. (3 *T. R.* 41.) *Brownsword* v. *Edwards*. (2 *Ves. Sen.* 243.) *Stapleton* v. *Cheales*. (*Prec. Ch.* 317.) *Dawson* v. *Killet*. (1 *Br.* 119.) *Mackell* v. *Winter*. (3 *Ves.* 536.) *Pearce* v. *Loman*. (*Id.* 135.) *Bolger* v.

Where the time is not annexed to the legacy but to the payment of it, the legatee takes a vested interest.

Mackell. (5 *Ves.* 509.) *Doe* v. *Moore.* (14 *East.* 601.) *Doe* v. *Nowell.* (1 *M. & S.* 334.) *Doe* v. *Sheffield.* (13 *East.* 526.)

RUFFIN, Judge.—I think the daughter, *Polly Harriet*, took a vested interest. The gift is by distinct words, importing an immediate bequest. It seems to me, that the subsequent clause is confined to the payment or personal possession of property; and so falls within the common rule. The first part certainly gives a present interest. Then come the words, "my will is, if my said daughter arrive to the age of eighteen years, for her to receive her said legacy that I have left to her, and take possession of it." "Receive and take possession" are equivalent to "shall then be paid." But it is said that *if* is a word of contingency, and by annexing it to the period of payment upon an uncertain event, namely, her living to a certain age, the happening of that event becomes of the essence of the bequest; and as the legatee died under that age, the legacy is never to be paid, or in other words never vested. There are cases, in which upon the plain intention of the will the general rule before mentioned must yield; if it appear upon the whole will, that it was intended the legacy should be contingent, and not merely the payment postponed. Such was the case of *Mackell* v. *Winter.* (3 *Ves.* 236, 536.) But that was upon the effect of the ulterior limitation over of the whole residue, upon the death of the three grand-children under age, which forced an implication of cross remainders between those grand-children, or rather that the fund was not to be divided; but kept for those children, or that one who did arrive at full age. But why should we give such an effect to the terms by which the period of payment is designated here. *If*, tho' generally denoting a condition, does not necessarily do so, if apparently not used in that sense. Here it is not referable to the interest in the legacy, but the enjoyment of it, and by a distinct sentence. Naturally therefore the case falls within the general rule. What is there to show the testator had a different meaning from that upon which the rule is founded? It is plain the testator did not mean to die

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Dec. 1831.

Cooper v. Pridgen.

intestate as to this legacy. Upon the death of the daughter without heir of her body, it is given over. And the contingency on which it is to go over, is not confined to her dying without issue under eighteen; but to her so dying at any time, whether under or over that age. Nor can it be supposed that he meant it to fall within the residue, upon any event but its abating by the death of all the takers, as well the remainder-men as the daughter. Yet if she had died under eighteen, according to the other construction, and had left a child neither the first nor second takers could have it: the first, because she did not attain the requisite age; the second, because the daughter had left issue. And then it would either go to the next of kin, or the residuary legatees. We may safely say, the testator could not mean that; and if not, it seems to follow that the legacy vested in the daughter; because that is the only construction which can prevent the other. The testator might well postpone the payment or possession to eighteen, and then direct it, because that is a usual age of marriage in this country. But when he gives over the property expressly upon her dying without issue, he could not mean that if she had issue at any time, she should not have it in her power to provide for it. This is the prevailing circumstance which governs me. It has controlled the construction of many wills. But there is another, which has no little influence. The legacy is a provision for an infant daughter, for whose support and education no other provision is made; and unless this legacy vested so as to give her the profits, (there being no intermediate disposition of it to another,) she would be wholly destitute. Did the father intend that? Besides, there is another reason, which is certainly slight and verbal, yet helps on to the same conclusion. The testator uses the words *revert back*, when he creates the remainder; which presupposes a vested title to have been in the daughter. Upon the whole, I conclude, that the daughter took a vested interest, subject to be divested upon the contingency of her death without issue; in which case there is a limitation over. But as the contingency is too remote, her interest remains absolute.

PER CURIAM.—Declare that *Polly Harriet Pridgeon* took under the will in the pleadings mentioned, a vested and transmissible interest in the legacy bequeathed to her therein, determinable upon the contingency of her dying without issue; and that the said contingency being too remote, the said *Polly Harriet* took an absolute interest therein, and reserve the cause for further directions.

JAMES HILL v. JAMES S. JONES.

Where a judgment on a bond was obtained, and after a return of not satisfied, became dormant, and ten years afterwards was revived, when the defendant, having discovered evidence that the bond had been paid, obtained a verdict, establishing that fact, upon an issue directed for the purpose, it was held, RUFFIN, Judge, *dissentiente*, that as the evidence was satisfactory to a jury, the lapse of time was not a bar to the relief.

This bill was filed in September 1828. It charged that the plaintiff gave his bond to *James Jones*, the defendant's testator, for £44 3 6, in December 1811, payable in ten days: that at three several days he made payments, the last of which *Jones* acknowledged to be in full; but excused himself from then delivering up the bond, by saying that he was too busy and was going from home, so that he could not look for it, but would surrender it, whenever called for. The bill then charged *Jones'* death, and that he appointed executors, of whom the defendant was the survivor; who finding the bond uncredited and uncancelled, brought suit on it and recovered judgment in August 1818, and issued an execution, which was returned "not satisfied" by their consent: that the plaintiff informed the executors, while the suit was pending or before, that he had paid the debt, and they declared they had no doubt of it, but that, being executors, they were compelled to sue, and leave him to his defence: that the plaintiff employed an attorney to defend the suit, who pleaded to it; but he could not support his defence, be-

Dec. 1831.

Hill v. Jones.

cause one *John Sessoms* the only witness within his knowledge, who could prove the payments, died either before or immediately after the suit was brought; and in consequence thereof, his pleas were withdrawn, and judgment by default entered: that only one execution ever issued, and the judgment became dormant. The bill then charged, that some time after the judgment, and upon the circumstances becoming known in the neighborhood and much talked about, one *Matthews* told the plaintiff, that he heard the testator, a short time before his death, say to him (the plaintiff) that the bond was paid, and that he would give it up when convenient. The plaintiff then charged, that from the execution not being issued again, he entertained the belief, that the executors were convinced the claim was unjust, and had abandoned it; and furthermore, that he was advised by persons in whom he had confidence, that there was no danger of the claim ever coming against him, and that he was ignorant in such matters, and rested satisfied therewith—especially, as he thought, if it ever should be revived, he could defend himself upon the testimony of *Matthews*.

It is then charged that a *sci. fa.* to revive was brought, and judgment obtained in May 1828. Upon the trial the plaintiff offered *Matthews* as a witness, who was rejected as incompetent to prove a payment made before the former judgment.

The defendant in his answer stated, that the bond was found among the testator's valuable papers, and that there was nothing to show, that any part of it had been paid. He admitted that the plaintiff always said to the executors, that he had paid it; but denied, that they told him, they had no doubt of the fact, or intimated to him that they would not enforce the collection. On the contrary, he alleged that although they did not, out of common courtesy, flatly contradict his positive assertion, they gave him distinctly to understand, that nothing could be done in the matter, but in due course of law: and as to the defendant's own knowledge or belief, he said that he knew nothing, and that he believed that most proba-

bly the debt was not paid; for he was altogether ignorant that the plaintiff was able to make payment. He further averred, that the execution was not suffered to lie either from motives of compassion, or a belief that the debt had been paid, but solely because the plaintiff was unable to satisfy it, until just before the last suit was brought.

The plaintiff filed the deposition of *Matthews*, who swore that he heard the testator at his own house, a few weeks before his death, tell the plaintiff, that the bond was fully paid, and that he would give it to him, if he would apply in a few days. He also deposed, that he gave this information to the plaintiff just before the last judgment was taken. The testator died in 1816.

Upon this case and this evidence, the court below submitted the following issue to a jury: whether or not the bond was paid to the testator; who found, that it was. And thereupon, his Honor Judge DANIEL decreed a perpetual injunction, and the defendant appealed.

Hogg, for the defendant, insisted, that since courts of of law had been in the habit of granting new trials, courts of equity refused to enjoin judgments at law, on account of any accident or surprise at the trial, unless the party against whom the judgment was rendered, was prevented by the frand of his opponent from availing himself of testimony; and that a delay of ten years, before an application for the interference of a court of equity, deprived the plaintiff of all right to it.

Gaston, for the plaintiff.

HALL, Judge.—I think the decree made by the Superior Court ought to be affirmed. The argument of most strength against it is the length of time, that elapsed after the first judgment was obtained upon the plaintiff's bond in the year 1818, until the filing of this bill. However, I do not consider that sufficient. The plaintiff, it is true, has not informed us of the time when he first discovered the testimony of *Matthews*, which he ought to have done. If the discovery was made shortly after the judgment was obtained, it was to be expected, that an earlier ap-

DEC. 1831.

HILL v. JONES.

plication would have been made to this court for relief against it. This may have been omitted thro' ignorance, or from a belief, that the plaintiffs at law would not proceed further upon it, after being made acquainted with *Matthew's* testimony. Be those things as they may, the time that has run since the judgment was obtained, until this bill was filed, does not, of itself, form a bar to the relief prayed for by the plaintiff. And it is further from it, as the defendants issued no execution upon the judgment obtained by them at law, but remained still, until they issued process upon it, and obtained judgment thereon in the year 1828. When this latter judgment was obtained, the plaintiff states, that he offered to prove the payment of the debt by *Matthews*, to which the plaintiffs at law objected, as they had a legal right to do. It therefore appears, that the defendant was slow in asserting his claim at law, and the plaintiff was backward in his application to this court, perhaps on that account. But the question was submitted to a jury in the Superior Court, whether the debt was paid to the defendant's testator in his life-time. They have responded that it was so paid. I therefore think, that the decree of the Superior court upon that finding should be affirmed; and that the defendant pay the costs of this court, but the plaintiff must pay the costs at law, and the costs in equity incurred in the Superior Court.

RUFFIN, Judge, *dissentiente*.—The decree, I think, is erroneous. In my opinion, if the plaintiff ever had equity and conscience on his side, he has lost it by his delay, and his bill ought to be dismissed.

Per RUFFIN, J. A court of equity requires active diligence as well as a just cause, because of the difficulty of ascertaining the truth in stale cases.

A reasonable diligence is the best evidence of good faith and a just cause. It alike promotes private interest and public convenience. It is the public policy to encourage it; because it prevents litigation, or if that must be, truth is arrived at more easily and certainly. We are obliged to distrust him, who prefers his claim at a great interval after its origin. We are still more forcibly impelled to distrust *a defence*, set up ten years after the judicial ascertainment of the demand of the creditor.

A judge, it seems to me, must be very confident of his sagacity in detecting falsehood, of his patience of investigation, of his capacity to ascertain the exact truth and his ability to do exact justice under all circumstances, if he be willing to enter into stale cases of this sort upon their particular circumstances. For my part, conscious of deficiencies, and of the perplexities in which I should be involved, and the danger of oftener doing wrong than right to suitors by such an attempt, I gladly take refuge under the well established principle of this court, which requires from him who would be heard in it, *active diligence*, as well as a just demand. After great delay, I cannot tell whether it be just or not. I therefore presume against it. I am obliged to seek some safeguard against my own fallibility, and those special pretences, which an artful man can contrive, to mislead me as to remote transactions. This I find in a presumption against *laches*.

The rule prescribes no particular time; but where the statute of limitations bars at law, it bars also in equity.

I admit, there is no law of the court prescribing a particular time for all cases. But in a case, to which at law the statute of limitations is a bar, it is equally positive here. And where there is no positive bar, yet equity, as its law, adopts the rule prescribed for courts of law in analogous cases.

The present, it is to be remembered, is not a suit for an equitable demand. The object is, to get a new trial at law, to let in a strict legal defence, namely, payment of the debt, for which there is a judgment at law. But relief is not granted here, merely because an unrighteous recovery has been had at law. That court is as competent as this to do justice, in cases within its jurisdiction, unless the defence has been lost by accident or fraud. Both facts must concur—right, and a failure of right at law, without the party's fault, in order to put this court in motion. And the question is, *when* this court must be applied to. It seems to me most reasonable, that the extraordinary interference of equity, to set aside the solemn trial and judgment of another court, ought to be asked for, if not forthwith, yet with the least possible delay, after the occasion for it arises. The situation of

Where the relief is sought against a judgment at law, to let in a legal defence unknown at the trial, the bill should be filed with the least possible delay.

DEC. 1831.

HILL v. JONES.

a defendant at law is in such a case hazardous in the extreme. There may be execution any day, or a new judgment without the possibility of defence, and then execution. Procrastination in such a situation can be imputed to nothing but the want of merits, or a most culpable negligence, ruinous to the parties and guileful towards the court. What is the legal analogy? If a party come to trial, the verdict cannot be set aside for a matter within his knowledge, for which he could have a continuance. Why? Because the court will protect itself from the abuse of such experiments, and require the party to act at the proper period on his knowledge of facts. And as to the other two legal modes of correcting verdicts unduly obtained, namely, by appeal or by *certiorari* in the place of it: the former is required by statute to be taken *immediately*: and the latter, by the course of the court, to be applied for *as soon as the party can.* Would the extraordinary remedy of a *certiorari* to re-try the facts be granted after a lapse of ten years, since the matter came to the applicant's knowledge? Certainly not. Neither ought this extraordinary equitable new trial?

This is in analogy to the rule at law on applications for continuances for newly discovered testimony.

And also where a verdict is sought to be set aside by appeal or *certiorari.*

But it seems to me, that we are not to decide this case upon such general reasoning alone. The legislature, moved by the great evil of injunctions, restrained the courts by the act of 1800. It recites, that injunctions are frequently applied for, for the mere purpose of delay; and that the facility of obtaining them enables debtors to defeat creditors of their just claims; and then enacts, that no injunction shall issue but within four months after the judgment at law is obtained, unless it shall appear by the oath of the plaintiff, that the application has been delayed in consequence of the fraud or false promises of the plaintiff at law, practiced or made *at* the time, or *after* obtaining judgment. I may admit, that this does not apply to relief founded upon an equity distinct from the matters tried or triable at law; as in the case of a judgment on a bond for the purchase money of land, of which a defect of title or eviction has happened since the trial. I may admit too, that altho' the injunction improperly issued, yet if the plaintiff's equity appear in the answer,

At any rate the plaintiff should be held, in analogy to the act of 1800 (*Rev.* c. 551) prohibiting the granting of injunctions upon judgments obtained at law, more than four months after the trial, to file his bill within that time after the discovery of the evidence.

it will not be dissolved; because the injunction, being collateral to and in aid of the relief, would be immediately re-issued. I think both of these positions right. But I must consider the statute imperative, where the equity is not admitted in the answer, and consists altogether of a legal defence, existing before the trial at law; which the party now wishes to make available by new proof, not kept from him by the opposite side. If the act does not apply to such a case, it does not to any. But then it is said, that this can only relate to a matter within the party's power at the trial at law. I do not admit that; because if it were in his power, he cannot come here at any time. But if it be granted, we are still bound to act in analogy to the statute and say, come within the four months *after the discovery*. If the analogy to the statute of limitations be obligatory on this court, still more clearly is the analogy to a statute, applying specially to a peculiar jurisdiction of this court, to be adhered to in similar cases. Why does the legislature tie us up to four months? Only because it is a reasonable time for men in common to apply to counsel, and prepare their cases; therefore a subsequent injunction must be for delay, and delay only. It is true, this bill was filed within four months after the last judgment, but the equity is against the first one. The last is not for too much on any other ground, than that the first is unconscientious. If the ground of equity is gone as to the first, it must be as to every thing built on it. If the plaintiff had filed his bill in 1825, against the judgment of 1818, would any judge have granted it, or hesitated to dismiss it on demurrer? I think the plaintiff at law cannot be worse off by a delay of three years longer.

But should I be mistaken in all this, there is another analogy, which is extremely strong. If time has hallowed the judgment at law, so that in *no* manner can it now be disturbed by a superior legal tribunal, it seems to me, that it ought to be equally respected here. *Five* years bars a writ of error. By analogy to that, five years barred a bill of review: and we have now a statute to that effect. If then errors of law, which appear upon the re-

Dec. 1831.

Hill v. Jones.

A judgment ought not to be set aside for testimony discovered after the time allowed the defendant to bring error.

cord, and must always be the same in every court, which go to show that the whole judgment is to be annulled, cannot be rectified, still less ought an enquiry into facts involved in that judgment to be entered upon, after that period. Why is a writ of error barred at all? It is not because that which was not law has become law: but because, if the judgment be reversed, at that late period, the party may in the meanwhile have lost his witnesses, and upon a second trial justice be defeated, as much by a perversion of the facts, as it was before by a mistake of the law. The legislature, acting upon general principles, and not presuming to canvass each case upon its particular merits, has therefore interposed this positive bar in *all* cases. The same reasons influence the discretion of this court in like manner. I have already mentioned the methods, by appeal and *certiorari*, of re-trying the fact at law, and remarked how strictly limited they are. I ask why equity should open the facts, after the courts of law are deaf to all errors, even of law?

Much more ought a bill to set aside a judgment for after discovered testimony, be dismissed, where if it sought to reverse a decree, it would be barred by lapse of time.

But if this court is not to respect legal analogies, it surely ought to have much regard to a statute establishing its own course. Five years is also by a late act a bar to a bill of review for errors of law or *fact*. If the debt here were due by decree, instead of judgment, the plaintiff would be clearly barred. I do not perceive that a verdict of twelve men, establishing a fact, is of less obligation than the opinion of the chancellor upon the same fact. Nor do I perceive, that the principle, on which we grant a new trial of an issue found in a suit at law, differs from that on which we entertain a bill of review upon newly discovered evidence. Then equal diligence ought to be exacted in each case, and that should be, that the party should apply as soon as he makes the discovery. The rule indeed is much stronger relative to injunctions against judgments at law; because the act of 1800 (*Rev. ch.* 531) enacts a distinct and express limitation.

If however we are to look into the circumstances, there is nothing here, in my humble judgment, to create an exception. The verdict is nothing. I lay it out of the case altogether. That is the very error of the court be-

low: for the plaintiff ought not to have been permitted to proceed to his proofs. His equity was gone by his *laches*. The very reason why he cannot have relief is, that there is a presumption against him, that he will not, after such a lapse of time, prove the truth. We will not therefore hear his proofs at all, unless he establishes, *in the first place*, that he did not know of them before. But if it were otherwise, there is no sufficient proof here. In this court, a verdict upon an issue ordered is not conclusive. It is only in aid of the chancellor's conscience. (*Bootle* v. *Blundel*, 19 *Ves.* 500.) And if it be not satisfactory, he may set it aside, or decree against it without setting it aside. (*Field* v. *Holland*, 6 *Cranch*. 8.) It is only evidence to us therefore, and cannot change the aspect of the case, for that would be to assume a jurisdiction upon the proofs, and not upon the allegations of the parties. Here the ground of my opinion is, that the delay of asking for relief excludes the party from it.

But examine the circumstances further. It is said, that the plaintiff was ignorant and poor. Poverty and ignorance are too vague for any court to act on. I shall be sorry to see the day, when a man will get more or less justice for being either rich or poor. If poverty has been so extreme, that the party, trying to act, was unable, that would prevent the effect of lapse of time, as creating a mere presumption. But that cannot set aside a rule of law, or a positive bar interposed by an act of Assembly. Poverty and ignorance cannot be replied to the statute of limitations. But there was no gross ignorance here of the party's rights, much less of the facts. The plaintiff consulted his friends, and might have consulted counsel. The case is reduced to this, that he received bad advice. But that cannot govern us. The circumstances of the plaintiff do indeed appear, from the answer, to have been slender. But if I know any thing of the spirit or habits of the people of this country, men in his situation are least likely to let a judgment hang over them. They regard it as a sword suspended by a hair; and are ready enough to embark in law, to escape its fatal fall. But one thing is decisive on this point.

Dec. 1831.

HILL v. JONES.

The bill itself is not framed on that idea. The plaintiff does not even sue as a pauper. He has been able to give good sureties *for the debt*. His poverty is not hinted at in the bill; much less is it charged as the cause of the delay. It is brought forward in the answer; and there is no particular distress of the plaintiff, or oppression by the defendant. He accounts for the delay, from the advice he received, that there was no danger; and from his belief, that he could defend himself on *Matthews'* testimony. This might do, if he were on the defensive merely. But at law he was indefensible; and in this court, he is the actor. He ought not therefore to have waited.

Then as to the delay of the plaintiffs at law: the plaintiff says, he thought they had abandoned the claim from a conviction of its injustice. He had no right to think so, without better evidence. The defendant swears, that he was mistaken in the motive of the delay. It does not appear—nay, it is not pretended, that any communication was had with the defendant to that effect. The plaintiff did not ask the defendant. He did not even inform him, what *Matthews* would swear. I repeat therefore, that he had no reason for his opinion. And I say he did not think so: for from the beginning, the executors gave him fair and distinct notice, according to his own showing, that "they were compelled to sue, *and leave him to his defence.*" There was then no "fraud nor false promise on the part of the plaintiff at law, at the time or after the judgment at law;" and the plaintiff's negligence has been gross.

Lastly, as to the time when the testimony of *Matthews* came to the plaintiff's knowledge. The witness indeed swears, that he told the plaintiff what he knew in May, 1828. Is that credible? It is directly contrary to the plaintiff's own oath. In his sworn bill he says, that some time after the judgment, this witness told him he heard the testator acknowledge to the plaintiff himself the full payment. "Some time" is, by itself, an indefinite expression. But elsewhere it is explained to mean "a short time." For he says, this information was received some time after the judgment, and on its being known

and much talked of in the neighborhood; and *that he relied on that evidence*, if any attempt should be made to revive the judgment. When was this talk? Surely at or about the time of the judgment; and not after it had gone out of people's minds by becoming dormant. And equally certain is it, that the plaintiff could not rely on proof to defend a suit, if it should be brought, which did not come to his own knowledge until the very month of the trial.

The delay cannot therefore be accounted for in any of these ways. And it is, in my mind, without excuse; unless negligence, delay and leaving things in doubt be merits of themselves.

I cannot imagine a case more happily illustrative of the soundness of the rules requiring active diligence, and making it a duty of conscience, in restraint of perjury, and in repression of the mistakes of courts. Were the plaintiff suing at law, he would be barred three times over. Were he prosecuting a writ of error or a bill of review here, for error of law or fact, both would be twice barred. Yet here he is to be allowed to proceed to his proofs; and by such proof as is false upon the face of his own bill, and relating to a conversation between the testator and the *plaintiff himself* fifteen years before, he is to deprive the defendant of the benefit of a judgment, rendered upon the withdrawal of his pleas, and as it were, by confession, and held, without resistance and without fraud on the part of the defendant, for ten years. I cannot believe such to be the law; and therefore do not concur with the majority of the court, that the decree below should be affirmed.

PER CURIAM.—DECREE AFFIRMED.

SPENCER L. HEART *et al.* v. THE STATE BANK *et al.*

A corporation has no right to retain the stock of an insolvent corporator to secure a debt due from him. Whether a by-law subjecting the stock of corporators to debts due to the corporation will give them this power? *Qu.*

The bill was filed in Wake, and the case made by it was, that one *Barnes*, being insolvent, conveyed all his

Dec. 1831.

HEART v. STATE BANK.

property to the plaintiff, for the purpose of securing his debts; that among other things there were five shares of stock in the State Bank; that the plaintiffs under a power from *Barnes* applied to have the stock transferred, upon the books of the bank, into their names which was refused. The bill prayed that the defendants might be compelled to transfer the stock.

The answer admitted the facts stated in the bill, but alleged that *Barnes* was indebted to them, and insisted that they had the right to retain the stock, as a security for that debt.

The cause was heard upon bill and answer.

Devereux, for the plaintiff.

Badger, contra.

HALL, Judge.—Stock in a bank is the subject of sale and of purchase; and the mode of transferring it is pointed out by law. It is as free from incumbrance as any other part of the debtor's property. The president and directors of the bank have the management and control of it, for ordinary banking purposes: but they have no lien upon it for any debt, which the holder of it may owe to the bank. The stockholder borrows money from the bank upon giving security for the payment of it, as any other person does who is not a stockholder; and the money is loaned upon the strength of such security; not upon any supposed liability of the stock.

In the case of the assignees of *Evans*, a bankrupt, against the Hudson Bay Co. reported at large in 7 *Vin. Ab.* 125, *pl.* 2, the company had made a by-law, subjecting the stock of any of its members in the first place to debts which they might owe the company. *King*, Chancellor, thought that by-law not a good one. But *Raymond*, Chief-Justice, and Baron *Price* thought otherwise. But they were all of opinion, that without a by-law, or some other law subjecting the stock to the company's debts, they had no lien or claim upon it. That seems an authority much in point. The same case perhaps, under another name, is to be found in 1 *Strange* 645 & 2 *P. Wms.* 207, tho' much more briefly reported. I feel but

little hesitation in saying, that the prayer of the bill ought to be granted.

PER CURIAM.—DECREE ACCORDINGLY.

THE FREE BRIDGE COMPANY v. JOHN WOODFIN *et al.*

Where the legislature incorporated the plaintiffs for the purpose of building a bridge, and authorized them to collect such an amount of tolls, as was necessary to keep the bridge in repair, and the defendants erected another bridge in the vicinity over the same river, which diverted the traveling, it was held, that to entitle themselves to relief, the plaintiffs must show that their bridge was always in good repair.

The case made by the bill answers and proofs was as follows: The legislature, by an act passed in the year 1822, incorporated the plaintiffs, and authorized them to build a bridge across the French Broad River in Buncombe, and to collect such an amount of tolls from persons passing it, as should in the opinion of Buncombe County Court be sufficient to keep it in repair. The bridge being at times out of repair, the defendants built one across the same river, which was entirely free; and thereby, as the plaintiffs averred, diverted the traveling from their bridge to such a degree, as prevented them from being reimbursed by the tolls, for the money which they had expended in repairing the bridge. The bill prayed an injunction to restrain the defendants from using their bridge.

The case was submitted by *Hogg*, for the plaintiffs, and *Gaston*, for the defendants.

HALL Judge.—The legislature, by the incorporation of the Free Bridge Company, had in view only the public good, not the private interest of the members who composed it. They therefore only authorized the collection of such tolls, as should be directed by the County Court, for the purpose of keeping the bridge in repair. Except for that purpose they have no authority to collect any thing. For the furtherance of the objects of the

Dec. 1831.

Free Bridge Company v. Woodfin.

law, the plaintiffs have not made out a case, that requires the interposition of this court. They state in their bill, that they procured an order of the County Court, authorizing a gate to be erected, and tolls to be collected. But they have neither produced a copy of such order, nor stated what tolls they were authorized to collect. They have not stated, nor given any *data* from which it can be understood, what amount of money is necessary to keep the bridge in order for any given time. For aught that appears, the tolls collected are sufficient, or may be more than sufficient to keep the bridge in repair, altho' the bridge erected by the defendants should be permitted to be used.

With these circumstances another reason combines to place relief beyond the reach of the plaintiffs; and that is, that the bridge has not been kept in good and sufficient repair. If there was a necessity for another bridge, because the plaintiffs' bridge was not kept in sufficient repair, it would be unjust to throw that bridge into disuse, when the plaintiffs thought proper to put their bridge in order. A toll bridge should at all times be kept in order, except for causes, which their owners cannot foresee and control. In the present case that has not been done, although the tolls which have been collected, or which might have been collected, are sufficient for that purpose.

The testimony taken in the case, without referring particularly to it, establishes the fact, that the bridge at all times has not been kept in good and sufficient repair for the passage of travelers. For this reason, as well as for that before given, the bill must be dismissed with costs.

Per Curiam.—Bill dismissed.

Dec. 1831.

NATHANIEL BROTTEN v. DANIEL BATEMAN, *et al.*

A court of equity has jurisdiction at the suit of a legatee against the executor of an executor, who has the funds of the first testator in his hands, although there is a surviving co-executor.

The case of *Bailey* v. *Shannonhouse* (*ante* 1 vol. 416) approved.

Thompson vs McDonald 2 D. & B. Eq 46

The original bill was filed in 1818 by *Brotten* and his wife against *Levi* and *Benjamin Bateman*, the executors of *John Bateman* deceased, who had been the former husband of the *feme* plaintiff, for an account of the estate. It charged that she dissented from the will. The defendants filed a joint answer, and admitted their joint administration.

Pending the suit, both of the defendants died; and at September term, 1820, a bill of revivor was filed, in which it was charged that *Benjamin Bateman* died and made *Daniel Bateman* and *James Wood* his executors, who took into their hands the assets of *John* and *Benjamin Bateman* to the value of £10,000: and it further charged, that *Benjamin* died first, whereby the administration survived solely to *Levi*, and that he reduced into his possession all the property of his testator *John*: That *Levi* then died, having made *Harman Bateman* and *John Bateman, jun.* his executors, who reduced into their possession all the effects of the first testator *John*, and also assets of *Levi* to very large value. The prayer was for process against *Harman* and *John, jun.* only, and that the suit might stand revived against them—which was ordered accordingly.

In March, 1823, *Eunice*, the wife, died, and her surviving husband, having administered on her estate, then filed, in that character, a second bill of revivor against *Harman* and *John*, the executors of *Levi*: on which the suit was again revived against them.

In September, 1827, on leave granted to amend in that respect as well as to revive, the plaintiff filed an amended bill and bill of revivor, in which he set out the former proceedings, and charged that in the bill of September, 1820, it was charged *by mistake*. that *Benjamin Bateman* died first, and that *Levi*, after that event, possessed

Dec. 1831.

Brotten v. Bateman.

himself of all the effects of their testator *John* : and the amended bill charged, according to what was alleged to be the truth, that *Benjamin* survived *Levi* ; and that in fact, a large part of the estate of *John*, the first testator, was in the hands of both *Levi* and *Benjamin*, which came to the hands of their respective executors, besides large amounts of the proper estates of *Levi* and *Benjamin* themselves. A *devastavit* by *Benjamin* of the assets of *John* was also charged, and that a sufficiency of *Benjamin's* estate came to the hands of his executors, *Daniel Bateman* and *James Wood*, to make good the same. The prayer was for process against *Daniel Bateman* and *Wood*, and that the suit should stand revived against them.

To this bill an answer was put in by *Daniel Bateman*, who survived *Wood*, wherein he denied that *Benjamin* did survive *Levi*, and that any assets of *John, sen.* came to the hands of *Wood* or himself; or that *Benjamin* had any of those assets in his hands when he died ; and alleged that *Benjamin* had in his life-time paid all that he ever had either to creditors or legatees, or to his co-executor *Levi*. He admitted assets of *Benjamin* in his hands, and further averred, that in 1817 a settlement of the administration was made between the two executors, *Benjamin* and *Levi*, on which it was found that *Levi* had all the estate in his hands except the sum of $85.85, which, it was admitted, *Benjamin* then had. But he alleged, that it was then agreed by *Levi*, that *Benjamin* should pay that sum to two other legatees on account of their legacies ; and that the defendant had done so, since the death of his testator *Benjamin*.

Upon this, after a replication and an order setting the cause down for hearing, the case was heard at September term, 1830 ; and a reference made to the master to take an account of the assets of *John*, the elder, which came to the hands of his executors, *Levi* and *Benjamin*, and of the same assets, which came to the hands of the defendant *Daniel*, executor of *Benjamin*, and also of the assets of *Benjamin* which came to the hands of the same defendant.

At March term, 1831, the master reported the account of the receipts and disbursements of the assets of *John*

Bateman, the original testator, whereupon a balance was found due to the plaintiff of $ 296 14, with interest from March term, 1830—that the administration of *Levi* and *Benjamin* was joint throughout, as long as *Benjamin* lived—that *Daniel* had assets of *Benjamin*, to a much larger amount than the sum reported in favor of the plaintiff—but that it did not appear, that any assets of *John* had ever come to the hands of *Daniel*.

To this report the defendant *Daniel* excepted, because the master charged the executors, *Levi* and *Benjamin*, jointly, with the estate of their testator, although *Levi* survived *Benjamin*, and without proof that *Benjamin* had wasted any of the estate, or retained any of it in his hands unaccounted for. But notwithstanding the exception, the report was then confirmed by DONNELL, Judge. And at the next term, the cause was finally heard before MARTIN, Judge, upon the report and pleadings, who pronounced a decree against the defendant *Daniel* alone, for the sum of $ 296 14, with interest, and the costs of the suit: from which that defendant appealed.

No counsel appeared for the plaintiff.

Badger, for the defendant.—A decree cannot be made against the executor of a deceased executor, where there is a surviving co-executor, unless upon the ground that some specific articles are in the possession of the defendant, or of collusion between the defendant and surviving executor. (*Beckley* v. *Dorington*, 2 *Eq. Ab.* 253. *Utterson* v. *Mair*, 2 *Ves. Jr.* 95. *Conway* v. *Stroude*, 2 *Freem.* 188. *Benfield* v. *Solomons*, 9 *Ves.* 77.)

RUFFIN, Judge, after stating the case as above, proceeded as follows:

Several objections are now made against the decree. One is that taken in the exception made below, namely, that there is no jurisdiction here against the executor of a deceased executor by a legatee, where a co-executor survives, unless there be collusion or insolvency of the surviving executor. That is not so in our opinion. It is true as to creditors of the testator. It is also true, where the legatee proceeds against a debtor to the testator. But this case is altogether dif-

Creditors have no redress against the executor of an executor, where

DEC. 1831.

BROTTEN v. BATEMAN.

ferent from those. Money in the hands of the executor who died first is not, properly speaking, a debt to the estate, but a part of the estate itself. The statute of limitations does not run against it. (*Bailey* v. *Shannonhouse*, *ante* 1 *vol.* 416.) It is true, the surviving executor may account with the representatives of the deceased executor, and receive payment. This is necessary for the benefit of creditors, who can only sue the survivor. Such a payment will discharge the estate of the deceased executor from further responsibility for that sum to any body; because it has been made to him then entitled to the possession of the estate. But where one executor is made liable to the legatee for the acts of his co-executor, as by a joint administration; or has committed a *devastavit*; or has the effects in his hands at his death, and no account has been had therefor between his executor and the surviving executor, a legatee may by a suit, in which all are made parties, call for the estate belonging to him, from whatever hand holds or is liable for it. It is a favorite principle of this court to follow the fund, wherever it is; and this for the benefit of him who is entitled to it; and also for the benefit of another, who is answerable for that fund, though not in his hands, as in the case of a joint administration. We are therefore of opinion that the decree ought not to be reversed and the bill dismissed, as to *Daniel Bateman*, on this ground. The trust upon which it was originally received attached to the estate, and passes with it to the executor of the executor, until it has been accounted for and paid over.

there is a surviving co-executor, unless upon the ground of collusion, or of the insolvency of the survivor.

A payment by the executor of one of two co-executors to the survivor will discharge the estate of the deceased executor *pro tanto*.

Legatees may in equity recover of the executor of a deceased executor and the surviving co-executor the funds in their hands respectively.

Another objection is, that the decree is against *Daniel Bateman* alone, who is the executor of *Benjamin*, without its being ascertained that *Levi's* estate or his executors are insolvent, and when the master states that no portion of *John's* assets came to *Daniel*. The decree seems to have been pronounced in this respect upon the idea, that as the administration had been jointly conducted, the executors were liable for each other's acts; and being so liable, the legatee had a right to proceed jointly and severally against them, upon the footing of contracts

Co-executors who jointly administer are liable for each other's acts.

at law. The first part of the proposition is correct. But the last is not the rule of this court. The course here is to do exact justice between all persons concerned; and hence where two are liable, in general both must be before the court; and in all cases, he who is primarily liable, and against him must be the decree for primary payment. For instance, at law a surety may be sued alone. But that cannot be done in equity. All the parties must be brought in. Again, equity may decree against a surety; but never that he pay the debt in the first instance, nor even jointly with the principal; but only that if the creditor cannot raise it from the latter, then he may from the former. So as between co-executors, they may be jointly liable at law, but they are never so here. In this court, each is liable for what is in his own hands. It is true, he may also be liable for what is in the hands of the others; but not jointly. He is not liable for the estate, as if in his own hands. He is only responsible for the other, and after him. They stand as reciprocal sureties for each other. Hence, although *Benjamin's* estate may be ultimately responsible for what *Levi* had not administered, it is not so in the first instance. It is manifestly unjust that he should pay the debt of *Levi*, while the estate of the latter is well able to do it. If he did, what would be the effect? Either *Benjamin* must lose it altogether, or begin another course of litigation with *Levi's* executers to recover it, in which all the accounts in this cause must be retaken, besides an account of the administration, as between the executors themselves. This is another reason, why the decree is erroneous. For the very ground of requiring all to be made parties is, that the whole controversy may be settled in one suit.

But upon an account of their administration, both are not jointly responsible to legatees in the first instance. He who has received the fund is primarily liable, and the other only in case of his default.

The reference therefore ought to have been extended, so as to take an account of the receipts and disbursements of the assets of the testator, *John Bateman*, by each of his executors, as between themselves, as well as the joint account which has been taken; and also an account of the assets of *Levi* in the hands of his executors. As to such parts of the estate of *John* as are in the hands of

Dec. 1831.

Brotten v. Bateman.

each of his executors, the decree ought in the first instance, to be against the executor of that executor, if he hath assets of his last testator. If indeed it cannot be thus satisfied, then the decree ought to require the estate of the other to pay it; because as the master finds a joint administration, (and no exception is taken to the report on that fact, or to any item of charge or disbursement, and the report was properly confirmed,) the legatees are to be paid at all events, if either executor be solvent. If the whole be found in *Levi's* hands, then his estate ought to pay, if able. If in *Benjamin's*, then the same rule applies to him. And here I will point out an inadvertence of the master, and a mistake in *Daniel's* answer, as to the fact of the assets of *John Bateman* coming to *Daniel's* hands. He may not have any now; but he expressly admits that *Benjamin* owed the estate $85 85 at his death, which he says that he, *Daniel*, afterwards paid to two of the legatees. If indeed the accounts were kept between the executors so loosely, as to make it impossible for the master to determine in the hands of which of them in particular the assets are, no other course is left, but to make each liable equally, that is, for one half in the first instance, and ultimately for the other half, if not obtained from the co-executor's estate. For they stand as sureties for each other, for what may be found in their hands respectively; and if that cannot be ascertained, then each is liable for one half himself, and as the surety of the other for the other half. So far then as the decree makes *Daniel Bateman* alone or primarily liable for the whole, it is, in the present state of the case, erroneous, and must be reversed with costs in this court; and the cause sent back with directions to make the additional inquiries herein mentioned, and thereupon proceed to a decree.

Per Curiam.—Affirm the decree, so far as it establishes the right of the plaintiff to the sum of $296 14, as the share of his intestate *Eunice*, in the estate of *John Bateman*, and reverse the residue of it by which the defendant, *Daniel*, is made primarily and solely liable therefor, and remand the cause with directions to enquire how

much of said sum was in the hands of *Benjamin* and *Levi Bateman* respectively, in their life-time, and came to the hands of their respective executors: and if any part thereof be found in the hands of *Levi*, or of his executors, the defendants, *John* and *Harman*, whether the assets of the said *Levi* are sufficient to answer the same, and if not, whether *John* and *Harman* are able to answer for any *devastavit* of the assets of *John*, the elder, or *Levi* their testator, by them or either of them made; and also with directions, to take all other steps necessary to a final decision between all the parties, and direct that the plaintiff pay the costs of this court.

THOMAS COX *et ux.* and NANCY HALL,

v.

GAVIN HOGG and WILLIAM M. CLARKE, *Exrs. of* DAVID CLARKE.

Where a testator, having expressed his determination to disinherit one of his children, bequeathed as follows: "my negroes I wish divided equally among my wife, *L. N. & O.* (his other children) and "in the case of the death of either, that their share shall be equally "divided amongst the survivors," it was held by HALL, Judge, that the words of survivorship were used solely to effect the testator's purpose of disinheriting one of his children, and that upon his death the estate vested in the survivors of *L. N. & O.* and was only divested upon their death without issue, when the share of the child so dying went to the survivors: But by RUFFIN, Judge, held, that the words of survivorship were used only to prevent a lapse; and that at the death of the testator the estate vested absolutely in the survivors, and upon the death of either without issue, his share went to the next of kin.

This bill, which was filed in 1831, alleged that *Marmaduke Norfleet*, being possessed of a large estate in money, slaves and other personal property, in the year 1802, made and published his will as follows: "First, "to my wife I lend the land &c. during her life. Se- "cond, to *Lucy Norfleet*, otherwise *Lucy Drew*, for the "purpose of preventing her from inheriting any part of

Dec. 1831.

Cox et al. v. Hoge et al.

"my estate, I give the sum of five shillings, paper money. And besides I here insert this article as a standing memorial, and to perpetuate to my descendants my abhorrence of her late union; that she has been to me an ungrateful and a most undutiful child; that when I am no more, should she fall into any distress, my children I hope will unrelentingly say, the distress is just; that she is only reaping the due reward of her ingratitude to the kindest and most indulgent parent. Third, the lands &c. I give to *Nancy Norfleet* and her issue, but for want of issue to the other of my surviving children, *Lucy Drew* excepted, who it is my most earnest wish may not in any case of death of my children inherit from them. Fourth, all the residue and remainder of my lands I give, devise and bequeath to the remainder of my children, to-wit, *Louisa*, *Olivia*, my wife being pregnant, to that should she be safely delivered, to them share and share alike, and in the case of their death to the survivors when they leave no issue. But to *Lucy Smith Drew*, proofs of daily ingratitude occur to determine, and I hereby provide that she in no case shall inherit one stiver more, in any case of death, than the five shillings above given to cut her off. My negroes I wish divided equally among my wife, *Louisa*, *Nancy*, *Olivia*, and the child of which my wife is pregnant, and in the case of the death of either, that their share be equally divided among the survivors, and also the remaining parts of my estate; providing in all cases, that *Lucy Drew* shall never inherit one stiver, in the case of the death of either of the above children or wife:"—which was upon his death in 1818 duly proved, and administration with the will annexed, issued to *P. R. T.* who paid the debts of the testator, and distributed the residue as directed by the will. That of the children of the testator, *Louisa* had intermarried with *David Clarke*, the testator of the defendants; *Olivia*, with the plaintiff, *Cox*; and *Nancy*, with *William P. Hall*, who was dead. That the child, with which the wife of the testator was pregnant at the time of making the will, was afterwards born and

died in the life-time of the testator. That *Louisa*, the wife of *David Clarke*, died in the year 1828. The bill then set forth the death of *David Clarke*, and the probate of his will by the defendants, and charged that they had in their possession all the slaves which came to their testator, upon his marriage with *Louisa Norfleet*, and prayed a discovery, and that they might be decreed to deliver the negroes to the plaintiffs.

The defendants demurred generally, and on the spring circuit of 1831, his Honor Judge Norwood, at the request of the counsel on both sides, gave judgment *pro forma* sustaining the demurrer, and dismissing the bill, from which the plaintiffs appealed.

Seawell and *Badger*, for the plaintiffs, insisted that the object of the testator was not to provide against a lapsed legacy, but that each of his children should take a life estate, and that the whole should finally vest in the last survivor. (*Billings* v. *Sandom*, 1 *Bro. C. R.* 393. *Nowlan* v. *Nelligan*, *Id.* 489. *Douglas* v. *Chalmer*, 2 *Ves. Jr.* 501. *Borwell* v. *Abey*, 1 *M. & S.* 428. *Blissel* v. *Cranwell*, *Salk.* 2261. *Cole* v. *Wade* 16 *Ves.* 46. *Leigh* v. *Leigh*, 15 *Ves.* 93. *Longmore* v. *Broom*, 7 *Ves.* 128. *Ex parte Ilchester Id.* 368. *Sims* v. *Doughty*, 5 *Ves.* 243. *Thellusson* v. *Woodford*, 4 *Ves.* 311, 329.)

Gaston, *Iredell* and *Devereux*, *contra*, contended that it was apparent from the whole tenor of the will, that the testator's great object was to exclude *Lucy Drew* and her descendants from any portion of his estate, and that as to the others, he intended they should enjoy the legacies respectively left to them fully and absolutely.

2d. That the words in the particular clause under which the plaintiffs claimed imported a tenancy in common, and should be so construed, notwithstanding the words of survivorship, which were inserted to prevent the legacies from lapsing.

3d. That by the expression in this clause, "in case of the death of either, that their share to be equally divided among the survivors," the testator did not mean a death at any indefinite period of time, but must have intended a dying during his lifetime; and in support of

Dec. 1831.

Cox et al. v. Hoos et al.

these two last positions they cited the following authorities: *Cambridge* v. *Rous*, 8 *Ves.* 12. *Hinckley* v. *Simmons*, 4 *Ves.* 160. *Southcote* v. *Watson*, 3 *Atk.* 283. *Bagshaw* v. *Spencer*, 2 *Atk.* 577. *Peat* v. *Chapman*, 1 *Ves.* 542. *Mendez* v. *Mendez*, 3 *Atk.* 625. *Stone* v. *Heurtley*, 1 *Ves.* 165. *Trotter* v. *Williams*, *Prec. Ch.* 78. *Bindon* v. *Suffolk*, 1 *P. Wms.* 96. *Stringer* v. *Phillips* 1 *Eq. Ca. Abr.* 292. *Lowfield* v. *Stoneham*, 2 *Str.* 1261. *Rose* v. *Hill*, 2 *Bur.* 1881. *Roebuck* v. *Dean*, 2 *Ves. Jr.* 265. *Bragrave* v. *Winder*, 2 *Id.* 634. *Perry* v. *Woods*, 3 *Ves.* 204. *Maberley* v. *Strode*, 3 *Ves.* 451. *Russell* v. *Long*, 4 *Ves.* 551. *King* v. *Taylor*, 5 *Ves.* 806. *Brown* v. *Bigg*, 7 *Ves.* 280. *Shergold* v. *Boone*, 13 *Ves.* 375. *Webster* v. *Hale*, 8 *Ves.* 410. *Ommanney* v. *Bevan*, 18 *Ves.* 291. *Newton* v. *Ayscough*, 19 *Ves.* 534. *Slade* v. *Milner*, 4 *Mad.* 144, 2 *Roper on Leg.* 264, 268, 4 *Mad.* 14.

Ruffin, Judge.—By this will, the land is limited over, upon the death of the first takers without leaving issue. The clause giving the negroes and the residue of his estate, and upon which this controversy arises, has not those words. The bequest is to the testator's wife and four of his children (of which one was then unborn) to be equally divided between them; and then come the words "and in the case of the death of either, that their "share be equally divided among the survivors." The bill states, that the child of which the wife was then pregnant was born, and died without issue in the testator's life-time. It may be here remarked, that this is the case which falls within the words of the will; which only provides for the death of one of the legatees, in which case the share is to go to the *survivors*, and not for a case, where the survivors or *survivor* is to have all. "If *either* die, the share to go to the *survivors*." But I do not suppose this restricted construction is allowable in the case before us; because it would not give room for the exclusion of *Lucy Drew* upon the death of a second.

The bill further charges, that *Louisa* married *David Clarke* and is dead, as is also her husband, and that the

negroes and other estate have come to the hands of his executors. It is not stated, whether *Mrs. Clarke* left issue or not. The plaintiffs are the surviving sisters, and the bill claims all the share allotted to *Mrs. Clarke*, as belonging to the plaintiffs and the widow as survivors.

If I were obliged to take it, that *Mrs. Clarke*, in fact, left no children, yet I am at liberty to consider, that the possibility and probability of her leaving issue were within the testator's contemplation, if it be necessary to aid in the construction of the will. If the construction of this clause depended upon its own terms alone, that might aid in collecting the true one. For a father must be presumed to mean such a provision, consistent with the words, for his children, as will best advance them. Their settlement in life and a provision for *their children*, must be taken to enter into the testator's mind, and will be so understood, if the words do not forbid. In this case, that conclusion is strongly fortified by the fact that the other parts of the will show, that he actually had that in view. He gives the land over, upon death without leaving issue. It is true, these words are omitted in the residuary clause. But that does not prove, that the testator meant to leave the families of all his children in poverty, to make an immense fortune accumulate for the benefit of the last survivor. It only shows that the personalty was not limited over, upon a death without leaving issue, though the death happened after the testator's own death; as is the case with respect to the land. Considering then that this is the will of a father, who is presumed to intend a benefit to the families of his children, and who says in other parts of his will, that he does so intend, such a meaning is to be put on it, consistent with the testator's words and the rules of law, as will best effectuate that end: which is by considering the bequest an absolute one to such of the children, as should outlive the testator, and once take.

Where a parent is making provision by will for his children, it is presumed that he intended to extend the benefit to their issue, unless the contrary expressly appear.

The authorities are in support of this construction. Wherever there is a tenancy in common, words of survivorship shall not defeat the effect of the other words, creating the tenancy in common. Because that would

Where a clause of survivorship is attached to words which create a tenancy

Dec. 1831.

Cox et al. v Hoos et al.

be to strike out altogether the words of partition; which cannot be done. Whereas "survivor" may have some meaning in every case, by referring it to some particular period other than a survivorship at an indefinite period, which would constitute a joint-tenancy and so contradict the provision for shares. Almost every case cited, from *Bindon* v. *Suffolk* (1 *P. Wms.* 96) down, thus states it. There is, indeed, in several of the cases a dispute, which is the true period of survivorship referred to, short of an indefinite period. And small circumstances have been laid hold of, to carry it forward from the death of the testator to that of the death of a tenant for life; or other period of vesting it in possession. Thus, *Bindon* v. *Suffolk* was reversed in the House of Lords, because the fund was a contingent one, to fall in *in futuro*, and that constituted an era, to which the survivorship referred. But the principle ruled by *Lord Cowper* was not impugned; namely, that the death of the testator is the era, if no other can be designated upon the will, or from the condition of the estate, short of a general survivorship. And that principle has been considered as decisive, ever since. *Lord Hardwicke* felt bound by it; and in *Haws* v. *Haws* (3 *Atk.* 523. 1 *Ves.* 13 & 1 *Wils.* 165) ruled according to it, although there the expression was, "with benefit of survivorship." He says *Lord Cowper's* reasoning was very right; that the surviving "must be applied to some particular time, and not to a dying indefinitely." He says, the House of Lords thought so too in *Bindon* v. *Suffolk*; but in that case fixed the time of payment as determining the survivorship, instead of the death of the testator: which last he calls an unnatural construction, as *Lord Thurlow* in *Roebuck* v. *Dean* (2 *Ves. jun.* 265) has done after him. But what does he mean by unnatural construction here? Plainly, he is speaking in reference to a survivorship at some period short of an indefinite one. He says it is unnatural to tie it up to the testator's death; because one seldom provides by will for what is to happen in his lifetime. I am not sure that it is not very natural, under the idea that the testator may not come to the know-

in common, it is construed as referring to some definite period.

This period is determined by the circumstances of each case.

In preference to a general survivorship, the death of the testator is taken as the true period.

ledge of the fact, though it should happen in his lifetime; or that he may provide at once for all, because he may not conveniently do it, when it does happen. But I will not set up my judgment against such names. Upon their authority I conclude, however unnatural that construction may be, when another period may be collected, not destructive of the tenancy in common, yet that it is to be taken as natural and reasonable, and intended, when opposed to the still more unnatural one of a survivorship indefinitely, whereby the whole estate accumulates for one.

This is the sum of what is said by those eminent judges. And with them accord others, no less able, both in chancery and courts of law. *Lord Alvanley* in *Russell* v. *Long* (4 *Ves.* 551) so says, in conformity to *Stringer* v. *Phillips* (1 *Eq. Ca. Ab.* 292) and *Bindon* v. *Suffolk*; and in that respect agrees with the previous cases of *Roebuck* v. *Dean* (4 *Bro. C. C.* 403) *Perry* v. *Woods* (3 *Ves. jun.* 204) *Bragrave* v. *Winder* (2 *Id.* 634) and *Maberly* v. *Strode* (3 *Ves.* 450). And *Lord Mansfield*, in *Rose* v. *Hill* (3 *Burr.* 1881) held the same upon a devise of land, at law, upon the ground of the tenancy in common, created by the words "to be divided"—saying, it was a provision by the testator for such of his children, as should survive *him* and be in existence *at the time* when the interest was to *vest*. The same doctrine is held in the later cases of *King* v. *Taylor* (5 *Ves.* 806) and *Newton* v. *Ayscough* (19 *Ves.* 534 besides others.

Another class of cases has been cited, in which there is a bequest to one, "and in case of his death," or "if he shall happen to die," then over; in which, according to the circumstances, the first has been held to take a life estate, and the will to be read, as if it was "upon his death"; or that the first is an absolute gift, if it take effect at all, and the meaning to be, to substitute one legatee for the other, if the first, by dying before the testator, never takes. Of this description are the cases of *Cambridge* v. *Rous* (8 *Ves.* 12) *Webster* v. *Hale* (*Id.* 410) *Ommaney* v. *Bevan* (18 *Ves.* 290) and *Douglas* v. *Chalmer* (2 *Ves. jun.* 501). These slight circumstances show

In a bequest to A, and "in case of his death" or "if he happen to die," to B, A is held, according to the circumstances of each case, to take for life, or to take absolutely, and B is only to be substituted in case of a lapse.

Dec. 1831.

Cox et al. v. Hoss et al.

that the gifts are successive or alternative, notwithstanding the words of contingency applied to an event, which is certain, but is uncertain as to the period of its happening. And the distinction contended for by the defendants' counsel, that the first taker in such cases, even if he survive the testator, must be held to take but a life estate, unless some expression in the will denote benefit to the issue or family, is material. Because the question is, what benefit was meant for each legatee? And even in those cases, if the will shows, that if the first take at all, he is not to have the mere profits, but to receive the principal itself, then an absolute property is held to be given, although those who were to take in the alternative be the children of the first taker. (*Webster* v. *Hale*). Much more is this so held, when those who are to take on the contingency are strangers; as is the case in the other cases cited. In *Cambridge* v. *Rous*, *Ommaney* v. *Bevan*, and *Hinckley* v. *Simmons* (4 *Ves* 160) there were no words of limitation, as executors, or heirs, or issue, annexed to the gift to the first taker; and yet in each, it was held absolute. And here, clearly, the share of each was to be determined at the death of the testator; the estate to be divided, and then received specifically by the wife and each child. There was no trust and direction to pay over the profits though the legacy is of a residue, including money and perishable chattels. These are circumstances, which cannot but point to the contingency contemplated by the testator, as that which would be determined at his death.

If A survives the testator, B takes upon the death of A, unless a benefit to A's issue is intended, or unless by the bequest he is to have the principal as well as the profits.

Much more is this the case, when B is a stranger.

Where the share of each legatee was to be determined at the death of the testator, and a division to be made, and there was no trust and direction to pay over the profits, especially where the legacy was of a residue, these are circumstances indicating that words of survivorship are to be restrained to the death of the testator.

But if this were not so upon this last class of cases, the decision would be controlled by the former, which relate to a different subject, namely, the effect of survivorship and the application of words of joint tenancy, up to a certain period, to an express general tenancy in common to two or more in the first instance. (*Lord Douglas* v. *Chalmer* 2 *Ves. Jr.* 506.) If the estate be a tenancy in common in creation, then the survivorship *must* be confined to the vesting of the estate or some anterior period; else the estate expressly created cannot exist; or rather would be turned absolutely into a

An express estate in common is not cut down to a joint tenancy by

joint-tenancy. In the one set of cases, the extent of interest is to be collected by circumstances controlling the words of contingency. In the other, the extent of interest is the result of the estate expressly given, to-wit, in common; which shall not be cut down, after vesting, to a joint-tenancy. In other words, the words of survivorship are introduced solely to prevent a lapse. And this is the stronger here, because it is a residuary clause; in which words of survivorship would have been unnecessary even to prevent a lapse, if a tenancy in common had not been intended and first created.

words of survivorship; and they are held to be inserted for the purpose of preventing a lapse.

Thus I think the law stands upon the authorities, if this clause is to be construed by itself. The survivorship naturally refers itself to the period of the vesting of the estate. It may be extended, upon the intention, to the division or vesting in possession. Or it may, in like manner, be restrained to the death of the testator. But every and any construction is admissible, rather than an indefinite dying.

But it is said, that here the anxious exclusion of *Lucy Drew* is predominant with the testator, and that the will must be so construed, as to affect that at all events; which can only be by successive survivorships, unless we introduce "issue" into this clause, and a limitation to the issue.

There is no need of a limitation to the issue; for there is none annexed to the devise of the land; from which *Lucy Drew* is as strongly excluded as from the residue.

Where a general survivorship is created in a residuary clause, what sort of a survivorship is intended may be ascertained from other parts of the will.

If necessary, the court might indeed look to the first part of the will to show, what sort of survivorship this general one in the residuary clause meant, and hold it to be after the death of one without leaving issue. Upon that construction, the plaintiffs would not be entitled; because the bill does not state that *Mrs. Clarke* died without issue, and therefore does not make out a title in the plaintiffs. And this is a construction justified by the example of *Lord Hardwicke* in *Haws* v. *Haws*. There the testator gave his personal estate to his four younger children, and added, "if any of them should die under age, and unmarried, I direct the share of him so dying shall go to the survivors." In another clause he gave

Dec. 1831.

Cox et al. v. Hooe et al.

his estate in D. to the same four children, and their heirs, "equally to be divided between them as tenants in common, with benefit of survivorship." The question was, what survivorship? At the death of the testator? Or indefinitely? Or upon the death of one of the children under twenty one, and unmarried? Certainly, not indefinitely, for the reasons before given. The will did not say, *like* survivorship; yet it was so held, because the bequest of the personalty showed that a survivorship of some sort between the children themselves, after his death, was meant; and none other could be meant, unless it was an indefinite one; which is admissible under any circumstances, where a tenancy in common is created. This will therefore might well be construed with reference to a death without issue; for that would effectually exclude *Lucy Drew*, until the death of the last child without issue; and she could be excluded no longer without an ulterior limitation, in that event, to a stranger; which has not been inserted.

But without that stretch, the disposition to the children is absolute, notwithstanding the clause of disherison. The two provisions must have a meaning put on them, and must also have a consistent meaning. The exclusion of *Lucy* is not to defeat the others also absolutely, altho' she may derive an advantage by their taking. As suppose, upon the construction contended for by the plaintiffs, the whole estate to come to one child, the last survivor, and that to die without issue and intestate. *Lucy Drew* would then take by force of the law, for the want of another. Shall the possibility of that prevent the last survivor from taking. Certainly not. The truth is, the testator did not know how to effect his angry purpose, and has failed to effect it in the view we are now taking, by omitting an ulterior limitation to a stranger to *Lucy Drew*. So he has also failed to affect her succession to one of her sisters first dying, by giving to them in the first instance a vested several interest in his estate upon his death. For the very chain of reasoning, which prevents words of joint tenancy, annexed to a tenancy in common, carrying out the survivorship to an indefinite period, equally opposes giving

that effect to the clause under consideration. For, if to exclude her, the estate must successively survive, then the tenancy in common, expressly created, must cease, or rather never existed, although it be clear, that while the estate is enjoyed, each enjoys in severalty. The two objects, carried out fully, are inconsistent with each other. Then they must be made to stand together, as far as they can; and it must be supposed nothing inconsistent was meant; and therefore that each was intended only so far as it was consistent with the other. The exclusion of *Lucy Drew* is consistent with the idea of a lapse; but not with a tenancy in common in possession after the death of the testator. It must therefore be restrained to the former case. But if this were not so, the general intent must prevail over a particular one. Here that is to provide for all his children, except *Lucy*, and to enable them to advance their families; and this the testator has done in a mode, by which, in a possible event, *Lucy Drew* may succeed to some of the children, before the death of all of them. This possibility is not to defeat altogether the legacies to the primary objects of the testator's affections and bounty.

I am of opinion therefore, that upon the death of the testator, which was in this case the period for the vesting and division, the legacies became absolute to his wife, and such of his children as were *then* living.

HALL, Judge.—The clause in the will, that directly relates to the personal estate of the testator, which is the subject of the present controversy, is as follows:—"My negroes I wish divided equally among my wife, *Louisa*, *Nancy*, *Olivia* and the child of which my wife is pregnant, and in case of the death of either, that their share shall be equally divided among the survivors, and also the remaining parts of my estate."

A clause of survivorship, superadded to words which in a will create a tenancy in com-

In deciding upon this part of the will, I agree with my brethren, that the legatees took as tenants in common, and that the clause of survivorship by legal construction must be considered as having been added to

Dec. 1831.

Cox et al. v. Hoge et al.

prevent a lapse, in case any of the legatees should die during the life of the testator.

In *Maberly* v. *Strode* (3 *Ves.* 446) the Chancellor says, "words of survivorship, added to a tenancy in common in a will, are to be applied to the death of the testator, unless an intention to postpone the vesting is apparent." "It is true," says *Lord Hardwicke*, in *Hawes* v. *Hawes*, (1 *Ves.* 14) "this is certainly not a natural way of explaining the testator's intent, as one seldom provides by will for contingencies that are to happen in his life; but if no other reasonable construction can be found, the court may resort to this." And he approved of *Lord Cowper's* reasoning in *Bindon* v. *Lord Suffolk* (1 *P. Wms.* 96) who adopted the same construction. It is certainly a more reasonable construction, than one which would consign to poverty the issue of a legatee who might die after the testator, by causing the property to go to the survivors, instead of having vested it in the legatee, and becoming a support for such issue.

mon, is held to be inserted for the purpose of preventing a lapse, unless a contrary intention is apparent.

Because a different construction would cut off the issue of the legatee.

It is to avoid a similar evil, that courts have frequently construed one word to mean another; as where an estate is given to a son, but if he dies before twenty-one, *or* without issue, then over to another. Now taking this devise literally, if the son had children, and died under the age of twenty one years, the estate would go to the remainder man, and such children would be left unprovided for. For as the father had lost the property, and could not make provision for them out of it, because he had not lived till twenty one, the remainder man would be entitled. To avoid this injustice, the courts have construed *or* as *and*, according to which construction the estate would not be divested out of the son, and the remainder man would not be entitled unless the son should die under twenty one years of age, and without issue. Such construction is so common, that it is useless to cite authorities to prove it.

For the same reason a devise to A, but if he die before twenty one *or* without issue, is construed to mean if he die before twenty one *and* without issue.

In the present case it might not be considered as going far out of the way, to believe that the testator meant this: that if either of the legatees should die before (in common parlance) they got their legacy, or before it ves-

ted in them, then the survivors should have it. However, the doctrine seems so well established, that words of survivorship added to a tenancy in common, are so construed as to prevent a lapse, and become inoperative at the death of the testator, that questions of that description may be considered as put to rest. (*Trotter* v. *Williams Prec. in Ch.* 78. *Bindon* v. *Suffolk* 1 *P. Wms.* 96. *Stringer* v. *Phillips* 1 *Eq. Ca. Ab.* 2. 3. *Rose* v. *Hill* 1 *Burr.* 1881. *Roebuck* v. *Dean* 2 *Ves. jun.* 265. *Perry* v. *Woods* 3 *Id.* 204. *Russell* v. *Long* 4 *Id.* 551. *Brown* v. *Higgs* 5 *Id.* 506. *Brown* v. *Bigg* 7 *Id.* 280. *Shergold* v. *Boone* 13 *Id.* 375. *Webster* v. *Hale* 8 *Id.* 410. *Ommaney* v. *Bevan* 18 *Id.* 292. *Newton* v. *Ayscouch* 19 *Id.* 535).

It is very true, that there are some cases emanating from high authority, which seem to look the other way. In *Billings* v. *Sandom* (1 *Bro.* 393) a bequest was made of £1000 to the testator's sister; and in case of her demise £800 was given to *James* and £200 to *John Billings*. *Lord Thurlow* held, that the sister was entitled for life, and afterwards the legacy was to go over to *James* and *John Billings*. So also in the case of *Nowlan* v. *Nelligan* (1 *Bro.* 489) the testator, having a wife and daughter, devised as follows: "I give and devise to my beloved wife all my real and personal estate. I make no provision expressly for my dear daughter, knowing that it is my dear wife's happiness as well as mine to see her comfortably provided for, but in case of death happening to my said wife, in that case I hereby request my friends *Staple* and *Hunter* to take care of, and manage to the best advantage for my lovely daughter, all and whatsoever I may die possessed of." In the first of these cases, *Lord Thurlow* put a natural construction upon the will; because there was no injustice to be avoided, nor great good to be answered by putting a legal or artificial construction upon it. With respect to the last case, it could not be intended, that in case the wife survived the husband, her right to the legacy would be complete, because there was a trust and confidence reposed in the wife that she should provide for the daugh-

But where the issue of the legatee are not injured by a natural construction, it is adopted.

Dec. 1831.

Cox et al. v. Hoag et al.

ter, which she could not execute until after the death of the testator, and in case of death happening to her, he substituted trustees to perform the trust. It is certain that a benefit was intended for the daughter after the mother's death, and that intention could only be carried into effect by allowing the mother a life estate.

In another case, *Lord Douglas* v. *Chalmer* (2 *Ves. jun.* 501) where a legacy was given to *Lady Douglas*. and *in case* of her death, to the use and behoof of her children, share and share alike, the chancellor thought the natural construction was, that the mother should take a life estate, and that the balance of the interest in the legacy should go to her children. In the case of *Cambridge* v. *Rous* (8 *Ves.* 12) legacies were given to two sisters, and in case of the death of either to devolve upon the other. The master of the rolls was of opinion, that the contingency should be confined to the death of the testator; and that afterwards, the legacies became vested. Here are two devises very much alike, and constructions very unlike each other put upon them. In the latter case the master of the rolls truly says, "that it is an incorrect expression to apply words of contingency to an event which is certain. A testator may mean the death of a legatee during his own life, or he may mean a death whenever it may happen. "Accordingly (he adds) in every instance in which these words have been used, the courts have endeavored to collect from the nature and circumstances of the bequest, or the context of the will, in which of these two senses it is most likely this doubtful and ambiguous expression was employed." He says in another part of the same case, that "ordinarily in gifts between near relations, if any restraint is imposed upon the first taker, it is for the benefit of children." Upon this it may be remarked, that parents are under a greater natural and moral obligation to provide for their offspring, than collateral relations are under to provide for each other or for strangers. Hence to carry the intent of testators into effect as to children, legal constructions are oftener resorted to than in the case of collaterals or strangers.

In the present case it must be taken, that the testator's ruling intent was to provide for his wife and children, except *Lucy Drew*. And this intent would be broken in upon, and the nature of the legacy and the context of the will disregarded, if only a life estate was given to the children, and they had not the power to provide for their issue, as I think will more fully appear by noticing other parts of the will, which are as follows: "To *Lucy Drew*, for the purpose of preventing her from inheriting any part of my estate, I give the sum of five shillings paper money. Besides I here insert this article as a standing memorial, and to perpetuate to my descendants my abhorrence of her late union; that she has been to me an ungrateful and most undutiful child; that when I am no more, should she fall into any distress, my children will, I hope, unrelentingly say, the distress is just; she is only reaping the reward of her ingratitude." Again in disposing of his real estate he directs, that if any of his children die without issue, it shall go to the other surviving children, *Lucy Drew* excepted. And in the clause which I have first noticed, in which he disposes of his personal estate, he adds the following injunction, "providing in all cases, that *Lucy Drew* shall never inherit one stiver, in the case of the death of either of the above children."

From these clauses it appears, that although the testator considered *Lucy Drew* to be a legal, component part of his blood, he also considered that the sin of ingratitude had transformed her into an excrescence, which he wished to lop off from his family. This is evident from repeated expressions of displeasure at her conduct. His great anxiety seems to have been to exclude her from participating in any part of his estate. There is no circumlocution in the devises or legacies. They are expressed in a pithy, laconic form. He seems to have been at no loss, either about the legatees or the *quantum* given to each. It was the common case of a father giving to his children. And had it not have been for his great excitement against *Lucy Drew*, we would probably read nothing in his will respecting survivors.

Dec. 1831.

Cox et al. v. Hood et al.

In construing wills, the great fundamental rule is to catch the intent of the testator, and be governed by that, if there is no maxim or rule of law opposing it. Acting in this case under the influence of that salutary rule, and taking into view all the clauses of the will, I can see nothing that should confine the contingency of the death of any of the legatees to the life of the testator. I think it obvious, that the insertion of the clause of survivorship was made for the purpose of disinheriting *Lucy Drew*. The clause was inserted more with that view, than from any idea the testator had of preventing a lapse. I think too, that it was not inserted for the purpose of confining the legatees to life estates; but that the legacies were intended to become vested at the death of the testator to all purposes but one; and that was, that if any of them died after the testator's death, (or perhaps before it,) without issue, and without having made any disposition of their legacy by will or otherwise, so that as in ordinary cases it would go to their next of kin, I say in such case the testator interposed and substituted the survivors in the place of the next of kin, for the purpose of excluding *Lucy Drew*. The testator's great purpose was to fix a guard upon his property, and have it conducted into futurity beyond the limits of his own life, free from any claim she might otherwise have to it. And he has done so, I think as far as the death of the last survivor. There he has taken leave of it. And if the last survivor should die intestate, and without issue, or without having made any disposition of it, *Lucy Drew* will come in for a share. He has created no barrier against her in such case. But she could take nothing upon the death of any preceding survivor similarly situated. This, I think, was the testator's intention; and I am not aware that it is opposed by any maxim or rule of law.

In the present case it appears, that *Louisa*, one of the legatees, intermarried with *David Clarke*, and thereby transferred her legacy to him. And although she is dead, *Lucy Drew* can take nothing as next of kin; and of course, the clause creating the survivorship is inoperative.

Thus the testator having shut up all the avenues thro' which *Lucy Drew* could derive any benefit from his estate, until it might vest in the last survivor, and then too, unless that survivor had died without issue, and without having made any disposition of it, his grand purpose was accomplished. Therefore in either view I have taken of the case, whether upon the clause alone that disposes of the personal estate, or upon that clause connected with other clauses in the will, I am of opinion, that the bill should be dismissed with costs.

PER CURIAM.—DECREE AFFIRMED.

MARY FINCH *et al.* v. ROBERT RAGLAND *et al.*

The court presumes against an administrator dealing with the estate for his own benefit, or that of a co-administrator; or claiming commissions while he keeps no accounts. Yet under special circumstances such dealings may be supported, and commissions allowed.

If a written statement, not on oath, of matters relevant to an inquiry before the master be received, and acted upon by him, the inadmissibility of such statement cannot be made the ground of exception to his report, unless the objection was taken before the master. *Aliter*, where the master receives a written statement of matters, which if sworn to would not have been admissible, because irrelevant without the production of a judgment or other record.

This bill was filed in August 1827, in the court of equity of Chatham, by the plaintiffs, the widow and next of kin of *Adam Finch*, for an account and settlement of the estate. It appeared upon the pleadings, that *Finch* died intestate in 1807, and administration was shortly after committed to the defendant *Robert* and to one *Abraham Harper*, who died in 1810 intestate, and upon whose estate the other defendants *Henry Branson* and *Thomas Ragland* administered.

In the court below it was referred to the master to state an account of the administration of *Finch's* estate, and to his report exceptions were taken by both parties; after which the cause was transmitted to this court, and here, at December term, 1831, the exceptions were ar-

DEC. 1831.

FINCH v. RAGLAND.

gued by *W. H. Haywood*, for the plaintiffs, and *Nash*, for the defendants.

No statement of the proofs or pleadings is deemed necessary to a full understanding of the opinion of the court, which was delivered by

RUFFIN, Judge.—The first exception of the plaintiff embraces a number of *items* of disbursement by the administrator, which it is said ought not to be allowed, because the payments are not expressly proved, but evidenced only in some cases by the receipts of the creditors, and in others by possession of the justices' judgments.

Written receipts for money of living persons are not strictly legal evidence of disbursements by an administrator especially where the money paid is due by account. But if such receipts be received and acted on by the master, without objection made before him, the exception cannot afterwards be taken.

It does not appear that this objection was made before the master. It would be manifestly unjust to take the parties by surprise with it here. All the bonds are receipted, and also the judgments given against the intestate himself; and they appear to be fair upon their face. Such receipts of persons living are not strictly legal evidence, to show a full administration, and especially upon accounts. But when they are taken and acted on by the master, without objection then made, one cannot be heard in a subsequent stage, unless it be founded on something unfair appearing. An instance of the last exists in the case before us. A receipt of *John Farrar* is offered by the defendants, which is dated in 1809. It is obviously of a later period, and was first written "1830." If this credit rested on the receipt, it would be rejected. But it does not. The judgment, to which it refers, was rendered against the administrators themselves in 1808; and a lapse of twenty three years, and the possession of the paper by the defendants is a strong presumptive evidence of the payment by them. For these reasons, the first exception of the plaintiff is overruled. It might be referred back on this point, if the plaintiff had upon affidavit stated a well grounded belief, that injustice was done.

A part of the second exception of that party is founded on the master's having received in evidence several receipts of sheriffs, expressed to be for money paid on

judgments and executions in court, instead of having the record. This would be allowed, but has been expressly abandoned by the plaintiff, and is therefore disallowed.

The third exception arises upon this state of facts :— Early in 1806, *James Finch* purchased from the defendant, *Robert Ragland*, two negroes, at the price of $650, for which he gave his bond with the intestate, *Adam*, his surety, payable December, 1807. The intestate died in November, 1806, before which time *James* removed to Georgia. The bill charges, that he was well able to pay the debt, but that the defendants lost it by neglecting to sue, and puts a direct interrogatory to the defendants, whether *James* was not solvent. The defendant, *Branson*, one of the administrators of *Harper*, says, that he has no particular knowledge of the residence and circumstances of *James Finch*, but that he has always understood that he removed to Georgia, and was insolvent. The defendant *Robert Ragland*, the surviving administrator, says, that *James Finch* became indebted here, and was obliged to sell one of the negroes to one *Snipes* in Chatham, who paid him. *Ragland*, $160 on his bond when it fell due ; that he then transferred the bond to *Harper ;* that *James Finch* was then insolvent, and has remained so ever since, as he believes. The plaintiffs have taken the deposition of *Crawford*, who says that he lived with *James Finch* in Georgia in 1805, and that he was then able to pay $600 ; for that in the next year, 1806, he came into this state and bought two negroes, which he carried out. Upon this case, the plaintiffs contend that the administrators were bound to sue, or show the insolvency of *James Finch* : while the defendants insist, first, that they were not bound at all to go out of this state ; and secondly, that the insolvency sufficiently appears. Upon the first point, the court sees no reason to question the rule lately laid down. But it is not necessary to consider its application to the present case, because the insolvency of *James Finch* sufficiently appears. His solvency and the neglect of the defendants are directly alleged in the bill. They are as

Dec. 1831.

Finch v. Rigland.

directly denied in the answer. That the defendants did make exertions to collect the money from him is not pretended: but if he was, in fact, insolvent, exertions would have been unavailing. That fact is positively affirmed in the answer, in a response to an express allegation of the plaintiff. It may be said, that the defendant ought to discharge himself by proof. In such case, the answer is proof. If an administrator inventory a debt as desperate, he cannot be charged with it but by proof on the other side, that it was collected or might have been. Here the plaintiffs have sought to charge the defendants upon their own oath. They must take their answer—subject, indeed, to be disproved. This the plaintiffs have attempted; but instead of succeeding, their case is the rather weakened by it. *James Finch* is the brother-in-law and uncle of the plaintiffs, and it is presumed better known to them than to the defendants. Yet they have examined but one witness, and he in North Carolina, who only proves, that in his opinion, *James Finch* was able to pay this debt two years *before* it fell due. The reason he gives for that opinion is, that he bought two negroes in this state in 1806. He does not mention any other property. It turns out, that he had not paid for them, but that he bought them on the credit of his brother; that they are the very negroes for which the debt now in controversy was contracted; and that he was obliged to sell one of them, before he returned to Georgia. The inference from this deposition cannot be that he was solvent; but as this is all the proof which the plaintiffs have been able to collect, the answer is rather fortified by its insufficiency. The third exception ought therefore, in my opinion, to be overruled. But a majority of the court is of opinion, that the fact of *James Finch's* solvency or insolvency doth not sufficiently appear in the answers and proofs, to enable the court to determine the propriety of subjecting the plaintiffs or defendants to the loss of this debt; and that it is a proper case for a further inquiry by the master. This exception, and the credit to which it refers, will therefore stand for the present, as being neither allowed or disal-

Per Ruffin, J. Where the solvency of the debtor and the loss of the debt by the neglect of the administrator are alleged in the bill, and the defendant, in answer to an interrogatory framed upon that allegation, denies the solvency and neglect, the answer is proof for the defendant, and it is incumbent on the plaintiffs to disprove it.

Where in such case the fact of solvency or insolvency does not appear upon the proofs satisfactorily to the court, a further inquiry will be ordered before the master.

lowed; and a further inquiry will be directed to be made on this point, in time to act on the report at the next term.

The fourth and fifth exceptions relate to the allowance of commissions. It is not a universal rule, that commissions will not be allowed where an account has not been kept. But it will be a general rule in this court, since it argues either a fraud, or negligence which nearly amounts to it. Here it does not appear, that the defendant ever returned to the County Court an account current, or got an allowance of commissions there. Neither does he exhibit an account with his answer. A trustee must be indifferent to the fairness of his conduct, who is unable to render any account. It imposes upon the *cestui que trust* the burden of hunting up evidence to charge him; whereas an honest man would charge himself. Under these circumstances, all claim for commissions would be rejected, were not the condition of the defendant very particular. He is a surviving administrator, and his co-administrator, who transacted much of the business, died nearly twenty years ago. The children of the intestate were infants, and the defendant avers that he frequently applied to their guardian to come to a settlement, and obtained the irregular but common order of the court appointing auditors: but the guardian would do nothing. This may serve for an excuse in the present case, considering the loose manner, in which executors have been permitted to keep their accounts; but it will not be taken as a precedent. The court doth not therefore positively allow these two exceptions, (fourth and fifth,) in their whole extent. But the exceptions are allowed, so far as they relate to the commissions calculated on debts owing from the intestate to either of the administrators, or on debts due to the intestate from them; but this does not include the prices of property bought by them at the sale, because they are charged with the prices obtained upon the resales. In all other respects, the matter of these two exceptions is reserved until the coming in of the report now to be ordered. If upon computation it shall turn

It is not a universal rule, that an administrator who keeps no accounts shall be allowed no commissions. It is however a very general rule, and will only admit of an exception under very peculiar circumstances.

Dec. 1831.

FINCH v. RASLAND.

out, that the defendants had, including a reasonable commission, disbursed the whole estate or very nearly, then the presumption that the accounts were withheld from improper motives will be rebutted.

Having disposed of the exceptions of the plaintiffs, we come now to those of the defendants.

The first is against the charge made by the master, of *interest* on the debts due the intestate, as mentioned in the inventory, from the time they fell due, and that on the sales made by the administrators, from the time they fell due. This objection rests upon the principle, that executors are not liable for interest before the expiration of two years, unless it be proved they received it.

An executor who keeps no accounts is chargeable with interest.

If debts bear interest, of course the executor receives it up to the time of payment. If he will not keep accounts, to show when he did receive the money, and how much, there are but two things the court can do. One is to charge him with interest, at the risk of making him pay it while the money lies by him. The other is, to let him keep the interest actually received by him as his own, and use the testator's money for his own purposes; and that there may be no evidence of the amount of interest collected, or of the amount of principal used by him, encourage him not to keep accounts, or full and true ones. Which of these principles ought to govern, it cannot be necessary to say. There is no alternative but one of the foregoing. This exception is overruled.

The production of the intestate's notes by an administrator is not sufficient proof of a disbursement.

The second exception is, that the master refused to allow a credit for the debts to *Griffis* on two notes. The master states his reason to be, that it was not proved, that they were paid by the administrators, and there is no receipt on them. They are produced by the administrators. But that is not sufficient; as they may have been paid by the intestate. If the case rested there, the report would stand. But there appear with the notes, as exhibits in the suit, two warrants issued on them *in* 1808 *against the administrators;* in which the plaintiff was nonsuited, because the witness did not attend to prove the notes—from which the plaintiff appealed. It does not appear positively what was done on the appeals;

but it cannot be doubted, that the defendants settled them. This evidence is conclusive, that the intestate did not pay the debts, and the possession of the notes shows, that either he or the administrators paid them. This exception is therefore allowed.

The third exception arises on the following state of facts, specially reported by the master: In May 1808, the defendant *Robert Ragland* and *Abram Harper* the administrators confessed two judgments; the one to *Branson* and *Harper* for £37 18; and the other to *Abram Harper & Co.* for £217 5. In each of these firms *Harper*, the administrator, was a partner. And the master reports, that he had seen the books of those firms; in the former of which *Finch* is debited with £29 7 6, and credited November, 1804, by *H. Branson* with £4 17, and on July 2d, 1808, with cash from *J. Sellers*, £14 2 6, leaving a balance of £9 18. In the books of *A. H. & Co.* it appears that *Finch* settled his accounts 28th of August, 1803, and gave his bond for £141 19 1, and that before his death he had other dealings to the amount of £118 2 11—making in the whole £260 1. The books show sundry credits in 1804 and 1805, amounting to £153, which the master deducts from the debits, thereby producing a balance of £109 1, which he supposes the true debt. When the judgments were confessed, *Mr. Harper* drew up the accounts which he swore to and filed in the cause. They are exhibited in this suit. That of *Branson* and *Harper* corresponds in the debits with the books themselves, with the exception of £6 10, for interest, and £2 0 6, money paid after *Finch's* death. Both credits are however omitted. That of *A. H. & Co.* does not correspond with the books, as to the debits. It omits the note for £141 19 1, altogether. It omits some of the items which composed the sum, for which that note was given, and includes others, not appearing on the books. One charge on 22d August 1803, against *Finch* is "to *John Farrar*" £98 1, which was sunk in the £141,19 1. Another charge on the same day after the note is "*John Farrar*" £16 10. The account filed in the action at law gave no credit for any part of the

Dec. 1831.

FINCH v. RAGLAND.

£153; but charges, in addition to what appears on the books, the sum of £18, assumed for *Jenks*, and the sum of £8,13 6, assumed for *Carpenter*. Upon this state of the case, the master rejected the judgments altogether, and the defendants except.

The court views with extreme jealousy the dealings of an administrator, for his own benefit, with the intestate's estate; and in like manner, the admissions of one administrator in favor of another. It is a suspicious circumstance, that an attempt was here made to conclude the matter by judgments. They are a nullity in themselves, and no effect is given to them as judgments, but only as evidence of a settlement between the administrators. As such they may stand, except so far as they appear to be unjust. If *Harper* were now living, he would be held bound to prove the debt again. The judgment does not admit it, except under circumstances. We cannot say, that an administrator cannot recognize the justice of a demand of his co-administrator; but that an acknowledgment will not be conclusive, nor even dispense with proof, when the situation of the parties is such as to enable them to give proof. There seems to be no reason in the case before us, to believe that *Ragland* did, or had a motive corruptly to admit an unjust demand. He does not seem to have known, or had reason to believe it unjust. Nor does *Harper's* conduct exhibit a fraudulent purpose. He made oath to his demand, and he *filed the account* of record, that resort might be had to it at a future day by those interested to investigate it. And it *appears*, that a large part of the debt was due. That is, it appears from entries made in his books in *Finch's* lifetime, when there is no reason to suppose, he had any expectation of administering. The whole demand may possibly have been just; and it might possibly stand in taking the accounts at this remote day, and long after the death of *Harper*. And clearly, I think, the whole is not to be rejected, because the whole account cannot be supported. But as the books are produced, I think they must govern us, except as to the items added in the account filed, of which entries were never

It is in itself a suspicious circumstance, that one administrator should confess to another a judgment for a debt claimed from the estate; and no effect will be given to it as a judgment; but the creditor, if alive, must prove the debt. But where such administrator is dead, and many years have elapsed, so that the means of direct proof no longer exist and all the circumstances of the case repel the presumption of fraud, the court will allow weight to the judgment as a settlement between the administrators.

made on the books. These are the sums of £18, for *Jenks*, and £8,13 6. for *Carpenter*. If these be added to the sum of £260 1, the sum of £287,3 6 will be made; from which the sum of £153 being deducted, the balance will be £134,3 6, with interest thereon to be computed from the dates of the items in the books. For this sum alone, I think the judgment ought to stand; and for that, I think it ought; because that sum appears to be justly due. The exception is therefore allowed, so far as respects the sum of £134,3 6, principal of the judgment in favor of *Abraham Harper & Co.*

After the foregoing opinion had been delivered and a decree entered according thereto, the plaintiffs' counsel filed a petition to rehear so much of the decree as allowed commissions to the administrators, and also so much thereof as sustained the defendant's exception to the master's report, rejecting entirely the credit claimed for the debts due to *Abraham Harper & Co.* and to *Branson* and *Harper*. And after argument, RUFFIN, Judge, delivered the opinion of the court as follows:

RUFFIN, Judge.—To the grounds stated in the former decree for the allowance of commissions the court has nothing to add. They then appeared to us sufficient; and they now seem so. The order must therefore stand as to that part of it. The other point raised in the petition was not free from difficulty when the decree was pronounced, and has been carefully reconsidered now. The result is an increased confidence in the correctness of the rule adopted.

The argument against it assumes, that the court dispenses with the production by an administrator of bonds alleged by him to have been due from the intestate to himself, or to have been paid off by him in the course of administration. The want of those bonds certainly presented an obstacle to the credit claimed by the defendant. But it is altogether a mistake to suppose that the court acted upon such a principle, or allows such latitude to administrators, as to give them credit without the production of the evidence of the debt. It was so

Dec. 1831.

Finch v. Ragland.

done in this case; but it stands upon *very special and peculiar grounds.*

A judgment in general is a sufficient voucher for the executor, without going further back. Here there was a judgment. But being by one administrator to another, and therefore incapable of being enforced at law, it was held by the court not to be conclusive as a judgment. But we could not say, it was not evidence of a settlement between the administrators, whereby the claims of one of them against the estate were adjusted; nor that such a settlement appearing to be fairly made, should not, after more than twenty years and the death of the administrator who was a creditor, be any evidence of the justice of the demand. Perhaps, under those circumstances, it ought to be taken as plenary evidence, and that if the court erred, the error was in correcting the judgment, or rather settlement by the books of the creditor—as was done. This correction was made for the want of the bonds, and the fear (not that we should do injustice in this case by allowing the whole debt, but) that it might be a precedent drawn to the aid of more fraudulent and more negligent representatives. The court allowed the judgment therefore to stand, as to so much of the debt as was contracted in the intestate's lifetime and would form debits on the mercantile books, only so far as the unexceptionable evidence of the entries, made in those books when there was no temptation or opportunity to commit a fraud by making false ones, sustained them. The reasons for this were, first, that thus far, the debts were proved to be true ones; second, that there was no ground to impute to the administrator, *Ragland*, the dishonest admission of an unfounded demand; thirdly, that he had reason to believe it just, as well from the production of the evidences of debt, as the oath of his co-administrator; fourthly, fraud on the part of *Harper* was repelled, as well by the fact of his oath as the exhibition and filing in the suit of an account in detail of the demands, and his affidavit of their justice, so as to give full information to those interested in future to investigate it; fifthly, that the specialties ought to have been filed, and must

A judgment against an administrator is in general a sufficient voucher for him, without other proof of the debt. But a judgment by an administrator against his co-administrator, being a nullity at law, is not allowed by a court of equity to have the effect of a judgment.

But such judgment is evidence of a settlement between the administrators.—And after the lapse of twenty years and the death of the administrator who was a creditor, the court allowed the administrator credit for the judgment, without further evidence of the debt.

be presumed to have been filed in the clerk's office with the record of the suit, and the loss of them must be taken to have happened there, and therefore that the defendants, *not being the persons to have the custody of them*, are excused from producing them; sixthly, that the death of *Harper* twenty years ago puts it out of the power of the defendants, however just these debts may have been, to offer further evidence of their justice, which could be heard by way of proof; and lastly, that those debts are positively stated to be just in the answer of *Henry Branson*, who was the surviving partner of those firms, and who is made a defendant in this suit as administrator of *Harper*.

Whenever all these circumstances shall again concur, to prove the probable justice of a credit, to repel the imputation of fraud or imposition, and to excuse the non-production of more direct and higher evidence, I shall be prepared to give to them, in combination, the same force and effect they had in this cause.

PER CURIAM.—PETITION DISMISSED.

SPENCER L. HEART *et al. v.* DEMPSEY BRYAN *et al.*

Where a testator died indebted to a bank, and his note was renewed by his executor as executor, and afterwards discharged by a surety who became liable subsequently to the death of the testator, it was held, that the surety had a right to be substituted to the claim of the executor and the bank against the assets; and the executor being in advance to the estate by reason of the debt which the surety had paid, that balance was decreed to be paid to the latter in preference to a subsequent assignee of the executor.

David Barnes was the executor of *Whitmell Bell*, and upon a bill filed by the legatees against him for an account of his administration, the following facts appeared. The testator at his death owed the State Bank $1500, for which *Barnes* was surety. Afterwards the note was renewed several times by other notes, signed by *Barnes* as executor, and by him and others as sure-

Dec. 1831.

Heart v. Bryan.

ties, until it was reduced to $900, when a note of *Elizabeth Bell*, the widow of the testator, for $2500, was substituted for it. The excess was used for the benefit of *Bell's* estate, and to that note *Barnes* and *Dempsey Bryan* were sureties. After five renewals, the note was again taken up by the discount of another for $1800 signed by *Barnes* as executor, and by him and *Bryan* as sureties. It was renewed several times and reduced to $1600, when *Barnes* becoming insolvent, it was paid by *Bryan*. Upon taking the accounts of *Barnes* with the estate of his testator, and allowing him credit for the note of $1500, due by the testator at his death, he was in advance to the estate the sum of $1375, which was paid into court under an order directing a sale of the assets of *Bell* the testator, and liberty was given for any person to apply for it by petition. Under this order *Heart* and others filed their petition, setting forth a general assignment of "all the real and personal property, bonds, notes or book debts, of which the said *David Barnes* was seised or possessed," in trust to convert the same into money and pay certain enumerated debts, with a power to *Barnes* "to apply so much of the aforesaid "funds as shall be requisite and necessary, to the settle- "ment of his accounts as executor of *Whitmell Bell*." The petitioners insisted, that the fund in court was the property of *Barnes* at the execution of the assignment, and prayed that it might be paid to them.

Dempsey Bryan, on the other hand, in his petition, set forth the above mentioned particulars respecting the discount and payment of the note, and insisted that as the proceeds of the note went to the use of *Bell's* estate, he, the petitioner, being a surety, was to be substituted to the rights of *Barnes* against the estate of the testator, and had a better equity to the money in court than the other petitioners.

Devereux, for the petitioners, *Heart* and others, cited *Bayard* v. *Hoffman* (4 *Johns. C. R.* 450) *Jackson* v. *Hudson* (3 *Johns.* 375) *Jackson* v. *Gardner* (8 *Id.* 394) *Sumner* v. *Williams* (8 *Mass.* 162) *Dey* v. *Dunham* (2 *Johns.*

C. R. 182, 189) *Stephenson* v. *Haywood* (*Prec. in Ch.* 310) *Tourville* v. *Naish* (3 *P. Wms.* 308) *Brace* v. *Marlborough* (2 *Id.* 491),

The *Attorney General* and *Gaston*, for *Bryan*.

HALL, Judge.—The defendant *Barnes*, by his deed of assignment in favor of his creditors, transferred and assigned over to the trustees therein named, considerable real and personal estate particularly described, and all other real and personal property of which he was seised or possessed, all book debts, bonds and notes of every description; and the trustees are directed to collect the debts, whether due by bond, note, open account or otherwise. He also expresses that the trustees shall have and hold the real and personal estate, and *choses* in action, and accruing interests, with the appurtenances &c. in trust &c. I am inclined to the opinion, that this general description of property includes any balance that might be due to *Barnes* from the estate of *Whitmell Bell*. (*Bayard* v. *Hoffman* 4 *Johns. Ch. R.* 450). Neither is that opinion varied by a clause in the latter part of the deed of assignment, in which he reserves the right to apply so much of the funds, as shall be requisite and necessary to the settlement of his accounts, as executor of *Whitmell Bell*. This clause was only inserted to secure that estate against loss by his insolvency: and can have no application, where it turns out that the estate is in debt to him. But this view of the case arises only from the deed of assignment, and the account that has been taken, and now made an exhibit, between *Barnes* and his testator's estate. From that account it appears, that the estate of *Whitmell Bell* falls in debt to *Barnes* in the sum of $1375. It is necessary to consider, how that balance arose, and this leads us to the consideration of *Dempsey Bryan's* petition. It appears from an exhibit in the case, which is admitted to be evidence, that *Dempsey Bryan* became an indorser for *Elizabeth Bell* on a note to the bank at Tarborough, for $2500, in the year 1826; that in the year 1828, *David Barnes* the defendant, renewed the note in his own name, and as ex-

DEC. 1831.

HEART v. BRYAN.

ecutor for *Whitmell Bell*, with *Dempsey Bryan* as surety or indorser, for the balance of the money due on *Elizabeth Bell's* note, which was $1800. This note was renewed by the same parties on the 9th day of December, 1828, for $1600. Suit was brought upon it, and the judgment was paid off by *Bryan*. It is to be observed too, that part of the money, for which *Elizabeth Bell* gave her note to the bank, had been received by her husband. After his death, his note was renewed by *Barnes* as executor, with different indorsers, up to the time when *Elizabeth Bell* gave her note with *Bryan* as her indorser. It appears from this statement, and it is admitted by *Barnes* in his answer, that the money thus obtained from the bank was applied to the use of *Whitmell Bell's* estate; and it is owing, no doubt, to that application of it, that a balance has been found in favor of *Barnes* in his settlement of that estate. For if *Barnes* had paid the debt due to the bank, his claim to it would be both legal and equitable. But that debt was discharged by *Bryan*, and he ought to stand in the room of *Barnes*, as to that balance coming from *Bell's* estate; for the money borrowed from the bank, which he had discharged, has produced it. No doubt this construction of the transaction occurred to *Barnes*, when he drew the deed of assignment. For if $1600, the amount paid by *Bryan*, is deducted from his credit in his account with *Barnes'* estate, he would have fallen two or three hundred dollars in debt to it; and therefore it was, that he made provision against loss to that estate, on account of his insolvency.

It is for these reasons, and from this view of the case, that I think the prayer of the petitioner *Bryan* ought to be granted.

RUFFIN, Judge, dissented, but delivered no opinion.

HENDERSON, Chief-Justice.—If *Barnes*, the executor, had borrowed the money of the bank himself, although he might have applied it to the payment of his testator's debts, perhaps the equity of *Bryan* who afterwards paid the debt, would be too slight to charge the estate of *Bell* with its repayment. The justice of the claim would be felt

by all; although perhaps it could be brought within no rule heretofore acknowledged by the court. But I think any honest man would be unwilling to hold under the mere bounty of one, whose assets were in conscience onerated with such a claim. The property is certainly benefited to the amount of the money paid. This impugns not the equity of the petitioner *Heart's* claim, for he is a sufferer, and is contending *de damno evitando*. In this case the money was borrowed by *Bell* himself and went to his use. The debt has continued ever since, sometimes in the name of the widow, and sometimes in the name of *Barnes* the executor. Although by the forms of the bank this debt was extinguished upon each renewal, as it is called, by discounting a new note, and carrying the proceeds to the credit of the preceding one, yet in reality it is the same debt. I view this case therefore, as if the original debt had continued until discharged by *Bryan*. And if this were the case, the equity is plain, and he is substituted to the rights of the bank, when they held *Bell's* note. And notwithstanding it may have been cancelled, or delivered by the bank to those who first renewed it, and by them thrown aside or destroyed, this court will set it up, even if the cancellation was made with the consent and by the directions of those who first renewed it; for these were acts which ought not to have been done or assented to. The original note should have been preserved for those who afterwards paid the money given upon its surrender. For the executor gave no consideration for it. It is true, he promised to pay, but did not. *Bryan* has done what he promised to do. Those not acquainted with the artificial rules of the bank, and who looked at the transaction itself as it really existed, considered it still the debt of the estate. Notes given for its renewal were signed by *Barnes*, as executor, as principal, and by himself as surety; and further he swears, that he thought the assets of the estate were bound for its payment. I am satisfied, that the time is not far distant, if it has not already arrived, when upon a note given in a form not to preclude an inquiry into the consideration, as where it is signed as executor,

Dec. 1831.

WHITESIDES v. GREENLEE.

and given for a debt due by the testator, the assets may be reached even at law.

I concur therefore, with Judge HALL, that there should be judgment for the petitioner *Bryan*.

PER CURIAM.—Direct the fund to be paid to the petitioner *Bryan*, and let each petitioner pay his own costs.

MOSES L. WHITESIDES, W. W. ERWIN, *et al.*

v.

WILLIAM GREENLEE and JOHN SUDDRETH.

A purchaser cannot call for the execution of a contract procured from a vendor while in a state of intoxication.

The bill stated that in August 1820, the plaintiff *Whitesides* purchased for a valuable consideration from the defendant *Greenlee*, eight lots in Morganton, and that *Greenlee* executed a bond with a condition reciting the contract, and providing for its execution—that afterwards, *Whitesides* assigned for value to *Erwin* and the other plaintiffs, all his interest in the lots, but that *Greenlee*, in order to defraud them, had conveyed the lots to the defendant *Suddreth*, who took the conveyance with full notice of the equitable title of the plaintiffs. And the prayer of the bill was, that the contract might be established and a conveyance to the plaintiffs decreed.

Greenlee, in his answer, denied any recollection or knowledge of the contract or obligation stated in the bill, but admitted that he believed from the information of others, that he had executed such a bond at the house of *Whitesides*, while he was in such a state of intoxication as to be utterly unfit for the transaction of any business, and even insensible of what he did. He also denied that he had ever received, so far as he knew or believed, any consideration for entering into the obligation to convey.

The answer of *Suddreth* admitted the purchase from *Greenlee* with notice of the plaintiff's claim, but averred that the plaintiff had procured it in the manner stated in the answer of *Greenlee*.

The proofs taken fully supported the answers, as to the situation of *Greenlee* when the bond was procured from him, and there was no evidence to shew what consideration *Greenlee* had received; or to shew that he had received any, except an acknowledgment in the condition of the bond that he had "received full and ample compensation for the lots."

The cause was heard at December term, *Gaston* appearing for the plaintiffs, and *Hogg* for the defendants.

HALL, Judge.—The plaintiffs in this case claim the specific execution of a contract, which they state was entered into by the defendant *Greenlee*, for the conveyance of the lots specified in the bill, for a valuable consideration. It may be taken for granted that *Greenlee* signed a written contract for that purpose. But the fact appears to be well established by the depositions taken in the case, that at the time when he signed it he was intoxicated, and not capable of making a contract; that the plaintiff *Whitesides* was not only conusant of his situation, but was instrumental in bringing it about. It is stated in the bill that the purchase was made upon a valuable consideration, but it is not stated what that consideration was, nor is any evidence offered, that *Whitesides* ever paid any part of it, nor is it even intimated of what value the lots were.

From this short statement of the case, the plaintiffs are not entitled to a decree for a specific execution of the contract; not because there are merits and equity on the side of the defendant, but because the plaintiff *Whitesides* has been guilty of a fraud in dealing unfairly with a helpless man, in procuring such contract to be entered into. He is at liberty to avail himself of any remedy the law will give him. But the bill must be dismissed with costs.

PER CURIAM.—BILL DISMISSED.

Dec. 1831.

Nathaniel C. Bissell v. Joseph Bozman.

The irregularity of a judgment at law is no ground of relief in equity. To entitle himself to relief, the defendant at law must show that advantage was taken of him, to preclude him from a defence against an unconscientious claim.

The original bill was filed in Chowan, and charged that on the 8th of May, 1819, the plaintiff was indebted upon a settlement with the defendant, in the sum of $1975 50; for which he gave his bond, bearing interest from date; and to secure the same, mortgaged a house and lot in Edenton, and a plantation in Chowan county, called New Sweden. This mortgage was not in the usual form; but by way of an absolute conveyance in fee, with a defeasance from the defendant. The bill further charged, that a short time afterwards, the State Bank obtained a judgment against the plaintiff and the defendant as his surety, under which two slaves, *Mack* and *George*, were sold by execution, and purchased by the defendant for $1091, upon an agreement that the plaintiff might redeem them at any time upon payment of principal and interest, and that accordingly the slaves remained in the possession of the plaintiff or his family.

The bill then charged, that the plaintiff, a seaman by profession, went to sea and was absent from 1819 to 1824, but that his pursuits were well known to the defendant, and that his family continued to reside in Chowan: That on the 10th of November, 1819, he remitted to the defendant $800 to be applied to the first mortgage; and on the same account the sum of $1,025 in a draft, on the the 30th of October, 1820. It also charged, that the plaintiff while absent was obliged to pay *M. Myers & Son* of Norfolk, Virginia, the sum of $499, besides interest, which had been disbursed in 1816, in repairs of a ship belonging to the defendant, of which the plaintiff was master, and which had gone into Norfolk, consigned with the cargo to the *Messrs. Myers*; and that such payment ought in this court to extinguish so much of the debts to the defendant: And that the defendant had during his absence sold New Sweden without the plaintiff's

authority, permission or knowledge, and received therefor $1500.

The bill then alleged, that the plaintiff was not bound to repay the sum advanced as the price of the slaves, but at his own election, as the defendant had an absolute sheriff's deed, and had never offered to reconvey; and upon this footing claimed to be the creditor of the defendant in the sum of $636, on the 29th of September, 1829; or if he was bound for the said sum of $1091, that he only owed on the said day a balance of $675.

The bill further charged, that in May, 1823, the defendant instituted an action on the bond, and had the writ returned "not found," with the view of issuing a judicial attachment, although he knew that the plaintiff was then at sea in pursuit of his calling: That he did issue the attachment, and in December, 1823, took a judgment by default, and upon an inquiry had damages assessed to the amount of $1959, without offering any evidence of the debt except the bond; but that he filed several statements and accounts in the suit, showing the particulars of his demand: That execution issued on the judgment, under which all the defendant's property was sold, including the negroes and the mortgaged house and lot in Edenton, at great sacrifice, viz. for the sum of $1821, though worth $6000; and except the slaves, was mostly bought by the defendant. It stated that the plaintiff returned home only a few days before the sale, and had not time nor means for stopping it. And that the defendant for the purpose of buying at an under value, dissuaded others from bidding, and gave out that he would purchase the property for the plaintiff's benefit, and let him redeem it.

There were annexed to the bill as exhibits, the several accounts charged to have been filed by the defendant in his suit at law.

In number 2, the plaintiff had credit for $1500, as the price of New Sweden, and was charged with cash paid as per receipt $150, and with various sums amounting in all to $1308, in discharge of judgments obtained against him—leaving a balance due him of $42. The bill

Dec. 1831.

Bissell v. Bozman.

charged, that the plaintiff never received directly or by agent the $150; and that he did not owe the judgments, or if he did, gave the defendant no authority to pay them.

Number 3 was a statement of the debt secured on *Mack* and *George*; in which credit was given for the $800; showing a balance due thereon to the defendant of $384.

Number 4 was an account of the proceeds of the draft for $1025. In it the plaintiff was charged with a bond of one *Tarkinton* for $421 (indorsed by him to the defendant before the settlement in May, 1819) and interest; and he was credited with the net proceeds of that draft, and with the sum of $199, received on *Tarkinton's* note: showing a balance due thereon to the plaintiff of $880.

Number 5 was an account current, in which the plaintiff was charged with the bond for $1957 and interest thereon, and $384, the balance on number 3; and credited by the above balances due on numbers 3 and 4, showing thereby a general balance due the defendant of $1959, for which judgment was taken.

The plaintiff next submitted to consider *Mack* and *George* as mortgaged, and that he was personally liable for that debt, (though not bound so to do,) provided the defendant would account with him for their value when sold under execution.

And he insisted, that he was not liable upon his indorsement of *Tarkinton's* bond; because the debt mentioned in it was justly due, and he indorsed it in April, 1819, and never received notice of its dishonor, though payable on demand.

The prayer was, that the defendant might come to a just account, and restore and reconvey all the property bought by him under his execution, thus unjustly and fraudulently obtained, upon receiving what might be found due, if any thing; and for general relief.

The answer admitted the bond and mortgage; and also the sale and purchase of the slaves, *Mack* and *George*, and exhibited a covenant of the plaintiff to pay their value if they died in his service, and an agreement for their

redemption; and averred that they continued in the possession of the plaintiff and his family, until resold under the defendant's execution in 1824. It also admitted the payment of the $800, and the draft for $1025; and averred that the former was applied to the mortgage on the slaves, and that a special receipt was taken from him therefor; and the latter to the bond debt as far as it would extend, deducting thereout the deficiency on *Tarkinton's* bond. And in relation to that bond, it was stated that it was indorsed in May, 1819, and immediately put in suit: That *Tarkinton* claimed and pleaded as set-offs mutual demands of his against the plaintiff, and had them allowed in the County Court; that the defendant prosecuted the suit faithfully and diligently, and appealed to the Superior Court, where the same result took place. It was admitted that notice was not given to the plaintiff; and the reason was, that he did not know where a notice would reach him abroad, and he was himself the plaintiff's agent here.

The answer denied any knowledge of the payment to *Myers & Son* charged in the bill; and alleged that he did not owe them, and that according to the plaintiff's own shewing, it was due in 1816, and therefore barred by the statute of limitations—which the defendant insisted on. It also denied that he gave the plaintiff any orders or authority to make such payment, or that he did make it before the judgment at law.

The defendant admitted the sale of New Sweden for $1500; but exhibited the plaintiff's letter written at sea, and dated July, 1819, requesting him to sell it at that price and pay himself: And it stated that about that time many of the plaintiff's creditors obtained judgments against him, and were about selling his property by execution, which induced the defendant, as his friend, to apply the $1500 to the discharge of those, instead of retaining it; and he did pay the debts mentioned in exhibit number 2, appended to the bill: And as to the $150 therein charged, that he paid it to the plaintiff's wife for the support of her family, and gave it to *Mr. Barney*, who was her friend and relative, and lived with her, to

Dec. 1831.

Bissell v. Bozman.

deliver to her, and took his receipt therefor, as defendant thought; but has since discovered that *Mr. Barney* wrote it, but did did not sign it: But he averred the fact to be, that he paid it.

The suit, attachment and judgment were also admitted; and the answer stated, that the long absence of the plaintiff, the large amount of the debt and the reduction of his property formed the inducement to it. The defendant denied all the allegations of fraud in relation to the injustice of the recovery, his views in obtaining it, or the use of any unfair means: He averred that he stated the accounts and filed them, to show to the plaintiff and to the world the fairness of the transaction; and that the suit was attended to, upon the trial, by the same *Mr. Barney*, who was an attorney of that court, and did not upon that occasion object to the $150 claimed upon his receipt: He denied expressly any unfairness in the sale, or that he induced any person not to bid, or wished to do so, or caused it to be understood that he would buy for the plaintiff, or that it was so understood: And he averred, that when the plaintiff arrived at home he offered to stop the execution, if his debt was secured to be paid in any reasonable time; but the plaintiff rejected the offer, and would do nothing—whereupon the sale took place, and he urged many persons to bid, as he was afraid his debt would not be satisfied, as turned out to be the fact, although the effects brought fair prices; and he averred, that the whole debt recovered was just and true.

The defendant filed a cross bill, seeking discovery from the plaintiff on many points, and charging various matters, in order that a final adjustment of all matters of controversy might be effected; the only parts of which it is material to state are, that it recharged the matter stated in the original answer, touching the special receipt for $800; *Tarkinton's* bond; the payment of $150 to the wife of the plaintiff, or *Mr. Barney* for her, and the payment of the judgments against the plaintiff; and sought discovery whether the plaintiff had not appointed him, the defendant, his agent, or requested him to pay

his debts; also whether the set-offs allowed to *Tarkinton* were not due; and whether the plaintiff had not been informed by his wife and did not believe, that she received the sum of $150 from him; and that he might deliver up the receipt and defeasance originally given for the plantation and lots, to be cancelled; And prayed further a final settlement of all matters between the parties; and particularly, that the defendant might be foreclosed from all power or right of redemption in the mortgaged premises, if he had any.

The original plaintiff in his answer to the cross bill insisted, that the whole of *Tarkinton's* note was due; and that he was discharged at law and in equity upon his indorsement, for want of notice, especially as he was once in Edenton while the bond was in suit, and conversed with the defendant, who did not inform him, that he was looked to.

He admitted the authority given by him to sell New Sweden, but denied that he recollected requesting the plaintiff to pay any debts for him, and averred that he did not believe he had; and insisted that if he had, payment ought to have been made before the costs were incurred: He did not deny that he owed the debts paid by the defendant. He exhibited the defeasance and the receipt for $800; which was expressed to be on account of the redemption of the negroes: but he alleged, that this was done by the defendant contrary to his orders. As to the $150 the answer was evasive and unsatisfactory—qualifying a general denial made upon the information of the wife, as at first drawn, by interlineation, so as to make it special and equivocal, the defendant saying, "*he* had no knowledge of the payment to *M. A. Bissell*, (*by the hands of G. W. Barney*,) and had understood from her, and so believed, that he never did pay said money (to *Barney* aforesaid").

Iredell and *Kinney*, for the plaintiff.—A court of equity will set aside a judgment at law obtained by fraud, or if by accident the defendant had not an opportunity of urging his defence. Or where the plaintiff at law has used improper means to obtain possession of the defen-

Dec. 1831.

Bissell v. Boxman.

dant's property at the sale, at less than its value, the court will declare him a trustee and compel him to account for the profits. (*Gainsborough* v. *Gifford*, 2 *P. Wms.* 424. *Walter* v. *Dalt*, 1 *Dick.* 8. *Bateman* v. *Willoe*, 1 *Sch. & Lef.* 205. *Barnesley* v. *Powell*, 1 *Ves. Sr.* 284. *Mitchell* v. *Harris*, 2 *Ves. Jr.* 135. *Cranstoun* v. *Johnson*, 3 *Ves.* 170. *White* v. *Hall*, 12 *Ves.* 324.)

Gaston, contra, cited *Hovenden's Sup.* 264.

Ruffin, Judge, having stated the case as above, proceeded:

It is insisted for the original plaintiff *Bissell*, that this is the case of a judgment obtained by fraud, where the defendant was precluded from his defence, and will be relieved in this court. It is alleged too, that it was irregular, and in a case not proper for a judicial attachment, and therefore this court will put the party back into possession of the property bought under it by the plaintiff.

The first observation called for by these positions is, that all matter of irregularity is out of the case here. That is a matter of legal jurisdiction, and not the foundation for coming into equity, except so far as it may be evidence with other things of a fraud—as where those proceedings denote an anxious hurry to put a demand, proved *aliunde* to be unfounded, through the forms of legal proceedings. The legal proceedings must be deemed right in this court, until the injustice of the recovery is shown by proof extrinsic of those proceedings themselves. If therefore the process of judicial attachment were not proper, that will, of itself, not avail the plaintiff. It was allowed by the proper tribunal, and the judgment founded on it must be taken to be conclusive here, although by it a recovery is made without having the party personally in court. It is not for us to say, that it is iniquitous, when the court of law supports it; much less, when the legislature gives in certain cases that proceeding, and in others that by original attachment; in each of which personal defence is seldom made, though it is supposed that it may, and in-

tended that it shall be in all. The plaintiff must therefore further show, that advantage was unduly taken of him by the use of this remedy, in such a way as was intended and did preclude him from defence; and secondly, that for want of such defence a recovery was effected, not merely of sums not duly proved on the trial, or of sums which could not upon defence be recovered from him in a court of law, but which the plaintiff at law could not recover, or having recovered, cannot retain with a good conscience by the law of this court. If indeed a judgment for a true debt be iniquitously used, the court will annul what has been done under it. Such was the case of *Lord Cranstown* v. *Johnston* cited for the plaintiff from 3 *Ves.* 170, and 5 *Ves.* 277. The defendant was pretending to treat with the plaintiff in England for the purchase of the estate at private sale, and while he was thus amusing him, and putting him off his guard, and his propositions were made with that intent, he gave secret instructions to an agent to proceed according to some summary colonial method to bring the estate into market, and purchase it for him. It was brought to sale, and the proceeding so shocked those present, that every one considered a good title would not be had under the sale; and nobody bid but the agent, and he purchased. No court could sustain such a transaction. The debtor was lulled to sleep; the creditor made the title doubtful, and under that disadvantage brought it to sale; competition was suppressed; and he bought at a great undervalue. His purchase was set aside on the score of fraud. Allegations are made in the bill of conduct on the part of *Bozman* at the sale, in some respects of the same character. But they are denied in the answer, and unsupported by proof. He could not have held out the idea, that he was buying for *Bissell*, and would allow him time to redeem; for the latter had just defied him, and given him distinct notice that he would not redeem, but seek to set the whole aside. And witnesses speak of facts which prove that *Bozman* urged bidders to give fair prices for all but the furniture, which he suffered to be bought in low by friends of *Bissell*.

If a judgment has been iniquitously used, a court of equity will annul what has been done under it.

Dec. 1831.

Bissell v. Bozman.

Then the cause stands entirely as to the evidence of fraud, upon the justice or injustice of the recovery. And upon that head, I must repeat, that in this court the question is, not whether the recovery was strictly proper by the rules of law, but whether it was against conscience to assert such a demand, and to receive payment. Both the conscience and law of the case are in general presumed in favor of the judgment of the court of law—which is taken to be conclusive here as in another court of law, unless under particular circumstances. (*White* v. *Hall*, 12 *Ves.* 324.) The court in an ordinary case would therefore not put the plaintiff at law to any re-proof of his demand. But here, as there is some evidence of an express agency, and there certainly was a confidential relation to some extent between the parties, and the suit was actually undefended, some proof was necessary in this cause. And the defendant here has offered it of a kind entirely satisfactory, as far as it was necessary to repel the charge of fraud. He proves incontestably the payment of the several sums as and for debts from the plaintiff to other persons. There is no doubt he was out of pocket to the extent recovered for those items; and in the answer to the cross bill, *Bissell* will not deny either of those debts, nor that he requested *Bozman* to pay them; but only that he does not remember such a request—while two of the witnesses, one of them an officer who had some of the executions, prove that *Bissell* said *Bozman* was his agent, and referred the officer to him for payment. It is not certain, that notice was required upon *Tarkinton's* bond. If one indorses a note upon which nothing is due, it is a fraud. Notice does no good; because the party already knew that payment had been made, and no further payment could be obtained. And if it clearly appeared here, that the set-off was just, and that *Bissell* was aware of it, there would be an end of the question even at law. But *Tarkinton* does not swear precisely, that his demand was a true one. He proves however, as the record of that suit does, that he pleaded and obtained the set-off; that *Bozman* contested both in the County Court and upon appeal, and

Where there is a confidential relation between the plaintiff and defendant at law a court of equity will set aside a judgment by default unless some proof was offered.

Where a note is indorsed upon which nothing is due, it is a fraud, and notice is unnecessary to subject the indorser

prosecuted the suit *bona fide*. It is to be recollected, that our inquiry here is, was there fraud? Had not *Bozman* a right then to consider, that *Tarkinton's* set-off was just? Was it dishonest in him who had lost the money by judgment of a court, to treat that judgment as rightly given? The question carries its own answer. The remaining item contested in *Bozman's* account is that of $ 150 paid to *Mrs. Bissell*. This is positively sworn to by him in his answer. A witnesss, his son, says he counted out the money to carry to her, though the son did not see him pay it. *Mr. Barney* says he has no recollection of receiving that sum, but that the receipt for it was written by him, and he cannot account for the want of his signature; that he was not the general agent of *Bissell*, but often acted in his affairs at the request of himself or his wife, and sometimes without request, because he thought it for his benefit. And he states that *Mrs. Bissell* talked of getting money from *Bozman*, but he does not know whether she did or not. The direct testimony of *Bissell's* wife cannot be had to the point. But he is interrogated in the cross bill as to the information derived from her, and his belief; to which he answers, as if making a special avoidance, not by way of general denial, but qualifying that denial, as first framed, by restricting the statement made by her to this; that she did not receive that sum by the *hands of Barney*, and that he believes that *Bozman* did not pay the money *to Barney aforesaid*. This is special pleading on oath, and so plainly evasive, as almost to amount to proof of itself, that *Mrs. Bissell* did *in some way* receive the sum; and at all events, with the other evidence, establishes the fact to an extent so nearly amounting to a moral certainty, as to leave no ground for impeaching the judgment upon the score of conscience.

The remaining ground on which *Bissell* contests the judgment at law, is that of a mutual demand for money paid *Myers & Son* for the disbursements of a vessel of the defendant. These disbursements occurred in February, 1816, when *Messrs. Myers* had effects of *Bozman* in their hands to a large amount. They several times

Dec. 1831.

Bissell v. Bozman.

rendered accounts to *Bozman*, and paid the balances; in which, they say, this sum was omitted through haste and mistake. In July, 1820, they applied to *Bissell* then in Norfolk for payment; which he refused upon the ground that he was not liable and of length of time, and referred them to *Bozman*. Of this *Bissell* advised *Bozman* under date July 18th, and on the same day *Myers* forwarded the account to *Bozman*, who refused to pay it; whereupon it was put into an attorney's hands, but no proceedings of law seem to have been had. *Bissell* had effects in the hands of *Messrs. Myers*, and among them a bill on the West Indies, which they were to collect for him. They failed, and made an assignment; and up to that time had received payment from no quarter But in May, 1824, they write to *Bissell*, that in 1822 their correspondent in Jamaica had given them credit for the bill, which they had not noticed until a late overhauling of their books and papers. They then advise him, that they have given him credit for that sum; and to liquidate it have *charged to him* the brig *William's* disbursements. Whether *Bissell* was originally liable for that debt, or could pay it after eight years and his former refusal, and thereby charge *Bozman* upon the new contract to himself, after the latter had refused to pay *Messrs. Myers* themselves; or whether this charging by bankrupts in discharge of a debt from themselves be such a payment as renders *Bozman* a debtor therefor; are questions not necessary or proper now to be decided. They will come up more properly upon the accounts hereafter to be taken, on another branch of the cause. But taking *Bozman* to be now liable for that debt, it entirely fails as evidence of fraud in taking the judgment. In that point of view it is subject to this decisive observation. *Bozman* contested that claim as against the original claimants; and at the time of taking the judgment, was not only ignorant that the debt was charged to *Bissell*; but the latter was also ignorant of it. For the judgment was in December, 1823, and the letter of *Messrs. Myers* to *Bissell* is dated May 28th, 1824.

It must therefore be declared, that the judgment was for a just debt, which *Bozman* might in good conscience receive.

This would dispose of the original bill, as it is not framed on the foot of the mortgages and the right of redemption. Indeed it denies the obligation at any time on *Bissell* to redeem the slaves. The *gravamen* of it is the fraud in getting, by an irregular proceeding, a judgment at law for a debt not due, and using the execution iniquitously. It sets out indeed the original debts and mortgage; but it is only to show, that they had been discharged; and there is no question made in the bill, upon the right of the mortgagee to sell the mortgaged estates for that debt; but the prayer is, to set aside the execution sale. Upon the grounds relied on, there is no foundation in the facts to support the prayer; and the bill ought to be dismissed, and would be dismissed at once were the plaintiff not entitled to relief upon other parts of the pleadings. For which reason, both causes will be retained, until the case shall be finally disposed of.

It has however been further insisted for *Bissell*, that the sale under execution does not bar redemption, but being for the mortgage debt, leaves that equity untouched, especially as to those parts purchased by the mortgagee. This depends upon the construction of the act of 1812. The question was touched in *Cox* v. *Camp*, (2 *Dev. Rep.* 502,) and was then said to be a difficult one. Upon further consideration I think it extremely difficult —in reference as well to the case, where a stranger purchases when the sale is made for the mortgage debt, known so to be, as where the mortgagee himself does. In this case, however, it does not arise. As to the purchases by others, they are not made parties to the original bill, if that were properly a bill to redeem; and consequently their titles are confirmed, and the price or the value taken as a substitute for the property. As to those made by *Bozman* himself; taking a sale under an execution to be a statute foreclosure, it must be admitted, that it is, as yet, a doubtful and unsettled doctrine; and being so, the creditor has found himself under the neces-

If the mortgagee obtains judgment and execution for the mortgage debt, and under the act of 1812, (*Rev. c.* 830,) sells the equity of redemption, and becomes the purchaser, how is the relation between him and the mortgagor affected thereby? *Qu.*

Dec. 1831.

Bissell v. Bowman.

sity of coming here, to ask that his defeasance may be brought into court, his title confirmed, and the mortgagor foreclosed. Equity does not lean to foreclosures, especially at short hand. It is true, that after what it deems reasonable time, it gives the mortgagee the benefit of the condition in law, and declares his estate absolute. Yet that is felt to be a case of hardship, and often to produce injustice. Hence any consent, express or implied, is seized as an occasion to open the estate to redemption upon payment of the debt, which is the real justice between the parties. If therefore upon a bill to redeem after any length of time, the defendant *submit* to redemption, it will be decreed. (*Proctor* v. *Oats*, 2 *Atk.* 140.) So if the mortgagee get a decree of the court of equity itself for foreclosure, and afterwards take out process upon any collateral security for the same debt, he waives the decree, if the mortgagor chooses. (*Dashwood* v. *Blythway*, 1 *Eq. Ca. Abr.* 317.) The reason is, he treats the debt as still due, and therefore his title as not absolute. Much more here, where the title is very doubtful in law, shall a bill for further foreclosure, if I may use the expression, remove that which I will not say has taken place, but may have taken place. It is true, the cross bill does not unequivocally admit the right of redemption, but prays for foreclosure, in case the debtor has the right. For this purpose, this is the same as a general prayer. The court is asked to investigate the accounts, and settle the title. Upon the footing therefore of the cross bill, the case is open for redemption upon payment of principal and interest, allowing to the debtor, in the accounts, credit for the value or price of such parts of the mortgaged effects as third persons bought; and a reference will be ordered accordingly. No directions are given about the application of the payments of the proceeds of the sales to particular debts, as would have been necessary, had the judgment at law been impeached by the decree; but as that stands untouched, and it is a common equity for mortgagees, as against the mortgagor himself, to tack judgments, the whole debt must be considered as the in-

But where a mortgagee purchases at a sheriff's sale, and filed a bill to have his title confirmed, held that he thereby consented to open the estate to redemption.

If after foreclosure the mortgagee in any other way treats the debt as still due, the account will be opened.

cumbrance, subject to such reductions as the debtor can make appear before the master.

PER CURIAM.—DECREE ACCORDINGLY.

ABRAHAM VILLINES *et al. v.* NATHANIEL NORFLEET.

Although an executor cannot purchase at his own sale, yet if he does, and there is no fraud, but he pays the purchase money for the use of the estate, and his accounts are settled and acquittances given by the legatees without the exercise of undue influence on his part, he cannot, after the lapse of twenty-nine years, be declared a trustee for the legatees of the slaves purchased by him.

The bill was filed in the year 1826 in Caswell. The plaintiffs charged that their father *Hezekiah Villines* was a resident of Nansemond county, in the State of Virginia; that by his will he left several specific legacies, and all the residue to his wife and three children, to-wit: the plaintiff *Abraham*, a son *Thomas* who was dead, and whose administrator was a party, and a daughter *Nancy*, and appointed his wife and the defendant executors, and died in the year 1784; that a large personal estate of the testator came to the hands of the executors; that the widow also died eight years after the testator, having intermarried with one *Jones* who was also dead, when the assets came to the hands of the defendant alone; that the defendant at two several sales of the slaves of his testator made by himself, bought negroes *Edmund*, *Milly* and *Penny* at an under value; that at the death of the testator his children were infants of tender years, and upon their arrival at full age were entirely unacquainted with the situation of their father's estate; that in the year 1789 the defendant went to Europe and was absent until the year 1797, when upon his return he became very anxious to settle his accounts as executor, and procured the plaintiff *Abraham*, then a minor, to be appointed guardian to the other children of the testator, and by his influence procured three incompe-

Dec. 1831.

Villines v. Norfleet.

tent persons to be appointed by the County Court of Nansemond commissioners to settle his accounts; that by these means and from the confidence which the plaintiff *Abraham* had in him, the defendant procured a settlement of his accounts, and prevailed on the commissioners to sign it, and paid to the plaintiff *Abraham* a balance thereby appearing to be due, and took an acquittance therefor; that shortly after the settlement the defendant removed to the county of Person in this state, and prevailed upon the plaintiff *Abraham* to accompany him and bring with him his infant brother and sister, and for several years treated them with great kindness; that the plaintiffs and defendants had resided there ever since; that *Thomas* died in the year 1825, and that *Nancy*, one of the plaintiffs, while an infant, intermarried with one *McKissack*, who died in 1818.

The plaintiffs then charged, that recently upon a visit to Nansemond, they had discovered that the defendant, in his account taken before the commissioners, had not charged himself with the sales of any negroes made by him, nor with the hire of the negroes during the time they remained in his hands, and in fact had not returned any account of sales, but had charged himself a gross sum of £847 13 for sales of all kinds of property, and neither had he delivered to the plaintiff *Abraham* the slaves which he had purchased. The prayer was, that the defendant might be decreed to be a trustee for the plaintiffs for the negroes bought by him, and their increase, and that he might come to an account of his administration of the estate of their father, and pay them any balance which might be due.

The defendant, in his answer, relied upon the length of time which had elapsed since the settlement, and insisted that the sales had been fairly and properly made, and the account honestly stated: He also averred that as to the hire of the slaves, he had no recollection of having received any, and believed that the slaves had been kept by the mother of the plaintiffs for their support, for the first eight years after the death of the testator. He admitted the purchase of three slaves, but insisted

that the same was legal by the laws of Virginia, and at any rate that it had been confirmed by a subsequent settlement between him and the plaintiff *Abraham*; copies of this settlement and of the receipts of the plaintiff *Abraham*, were filed with the answer; they were made on the 11th and 14th of December, 1797.

A good deal of testimony was filed which it is not necessary to state.

Winston, for the plaintiff.

Nash and *W. A. Graham*, for the defendant.

RUFFIN, Judge.—The bill was filed in 1826, and seeks a general account of the estate of the plaintiff's father, of whom the defendant is surviving executor. And particularly it prays a division of several slaves and their increase, which the defendant claims as having purchased at sales of his testator's estate in 1797 or before, and of the hires of them and other slaves before that time. The bill states the death of the testator forty-two years before the filing of it; and it admits a settlement made in December, 1797, between the defendant and the plaintiff *Abraham*, in his own right and as guardian of the two other plaintiffs, his brother and sister: And seeks to avoid that settlement upon the grounds, that *Abraham* was then an infant wanting six months of full age; that the three slaves, *Penny*, *Milly* and *Edmund* (claimed to have been purchased by the defendant) were not included in it, nor the hires of any of the negroes of the estate; and that if those negroes were included in it, the defendant's purchase was fraudulent and void, being at his own sale.

There is not the least doubt that the negroes were accounted for in the settlement of 1797. The account current exhibited with the bill gives the estate credit for £816 6 10, as "amount of sales." What was that large sum for? The account was stated by commissioners appointed by the court on the 11th of December, and the receipts given by *Abraham* bear date the 14th of December; and the last sales of negroes were made at or before the last day. At the sales, the plaintiffs, although

Dec. 1831.

Villines v. Norfleet.

some of them were infants, purchased; and the receipts clearly show, that *Milly* and *Edmund* were then claimed and admitted to be *Norfleet's* under his purchase, as *Penny* was under a former one. They are given for the negroes specifically bequeathed to each child, and also for those bought by them at that sale, being expressed to be for "negroes which the executor allowed them to buy at public sale"; and they are also for six negroes mentioned by name, "remaining of my father's estate after payment of his debts." *Penny*, *Milly* and *Edmund* were known to all the parties as having belonged to the estate, and therefore must then have been considered as *Norfleet's*. Indeed it is stated in the bill, that *Norfleet* then claimed them, and procured *Abraham* to be appointed guardian, and took the receipt *for the purpose of confirming the sales*. With the knowledge of these facts, can there be a rational doubt, that the commissioners must have included the prices of those negroes in the sum of £816 6 10; or that the plaintiff *Abraham* would have settled upon any other principle; for he was present at the sale and made purchases himself. Were his own included? If so, why not *Norfleet's*? But the receipts, as expressed, are conclusive.

I do not inquire then, whether the commissioners or the executor made the sale; or whether in either case the executor could purchase by the law of Virginia; as to which there is evidence in the affirmative. The right of the defendant does not rest on the purchase itself. He accounted for the value, which was accepted by the legatees; who thereby confirmed the title. The court does not mean to say, that a guardian and executor can in an improper case, where there is no necessity for a sale or the like, bind the ward by such a confirmation. And it is true, that the court does not encourage transactions of this sort between trustee and *cestui que trust*; and will, if undue influence can be proved, or can even be slightly inferred, and advantage made by the trustee, be ready to give relief, if asked for in reasonable time. Was a sale necessary? The contrary is not even alleged. Indeed the plaintiffs bought at it. Was the price

inadequate? There is no allegation of that. It has already been shown, that it was paid in account. Was the settlement unfairly made, and by means of undue influence acquittances obtained? It was not done in privacy, where such influence could be most effectually exercised over an inexperienced youth by an uncle; but with the assistance of three justices of the peace appointed by the court, and proved to be capable and upright men. I know of no principle, upon which such a sale, necessary and for a full price, followed by a settlement in which the price is accounted for—supposing the parties to be all *sui juris*—could be impeached, however recent the transaction. Much less, where the express confirmation receives the sanction of twenty-nine years acquiescence.

There is an effort however to avoid the effect of that, by alleging that the settlement is itself inoperative, because *Abraham Villines* was an infant; that soon after the sale, *Norfleet* removed from Nansemond to Person county in this state, and brought the plaintiffs, his nephews and niece with him, and treated them for a long time with great kindness, so that they did not suspect *until lately* (that is, in 1825) any unfairness; that the plaintiff *Abraham* then went to Nansemond, and discovered that no inventory nor account of sales had been returned, and that in the account current there were no partilars of the sales, but only a lumping credit of "account of sales"; and that there was no credit for the hire of negroes, though several of them were grown. But the bill admits the charges for debts paid, to be just.

There is no distinct evidence of the age of *Abraham*. It must therefore be taken that he was of full age. He acted as if he was; the defendant, his uncle, treated with him as such; and the County Court appointed him guardian of his brother and sister. But it is a circumstance of very little consequence, as the case is now situated: for he and the others have acquiesced many years after full age.

Then as to the new discovery. What has been discovered? Any unfairness? No; but that there might

Dec. 1831.

Villines v. Norfleet.

have been unfairness, for ought that appears on the account current, because the particulars are not given. Is that a new discovery? It must have been known to *Abraham* when he settled. But suppose that he did not then know the manner in which the account was stated, it does not follow that the particulars were not exhibited both to the commissioners and to him, when the settlement was made; nor especially, that the negroes were not accounted for therein. It has been already shown, that the negroes were, in fact, included, notwithstanding that does not expressly appear upon the account. It cannot be supposed the commissioners would state the account without knowing the particulars. No force is given to their report *proprio vigore* as a bar; but it rebuts the presumption of fraud, and invoking their aid is a circumstance to show, that the particulars were then known to all the parties, because they as well as the plaintiff would naturally require them, although the account does not exhibit them to us now. The plaintiffs ought to show that an error was committed. The most material one suggested by them turns out to be unfounded in truth. The pretence of new discovery then can avail nothing. The only thing discovered is, that the account is in a particular form. But that neither proves, that the fact was not known at the time; nor that wrong was done to the plaintiffs; nor that the defendant ought not to retain the slaves, which other documents prove he paid for. Above all, the parties knew that some account had been settled, and that acquittances had been given nine and twenty years before; and they were bound to look into any possible error sooner. Here, the three commissioners are dead; the executrix who managed the estate exclusively for eight years, while the defendant was in Europe, and her husband are also dead; the witnesses to the receipts, and every other person conusant of the sale and settlement, except the parties, are in their graves. It is impossible then to give further explanation; and the answer is precise as to the justice of the settlement. Time is evidence, from acquiescence in the exercise by another of an adverse right,

A settlement of the account of an executor by commissioners appointed by the County Court is not a bar to a future account, but it rebuts the presumption of fraud.

of the grant of that right. But it is further respected, upon a principle of *public* policy, as a bar to the investigation of that right, because the truth cannot be discovered. Here indeed the proof, by documents, happens to be clear as to the value of the slaves being accounted for; but these are only presumptions. As to the hires before that time, they may be included in the £816 6 10; they may not have been received by the defendant, who was in Europe, but by the executrix, and otherwise accounted for; or the negroes may have been kept together by the mother for the support of the family, as the evidence makes probable. The parties knew they were entitled to them; and they knew the estate was closed. After all witnesses are buried and vouchers given up, a new account cannot be ordered upon a bill filed twenty nine years after the trust was last acted on—the parties all living in the same neighborhood, and for nearly the whole time under no disability. Transactions of that period are seen by too uncertain and obscure a twilight, to be sufficiently clear for judicial action. The difficulty of arriving at the truth is insuperable; and others would be encouraged to sleep upon their claims. The court must say, you come too late. *Petty* v. *Harman* (*ante* 1 *vol.* 191) is not as strong as this case.

The case of *Petty* v. *Harman*, (*ante* 1 *vol.* 191) approved.

PER CURIAM.—BILL DISMISSED.

NATHANIEL ROBARDS & DELPHIA WASHINGTON *Exrs. of* JOHN WASHINGTON v. JAMES L. WORTHAM *et ux.*

Where a testator in his life time subscribed for stock in the Roanoke Navigation Company, and died without completing the payments, and by his will gave specific legacies, and created a fund for the payment of his debts, it was held, the fund for the payment of debts and the undisposed of residue being exhausted, that the stock in the hands of the heir should be subjected to the payment of the balance due upon the subscription, in exoneration of a specific legacy.

John Washington in his life time subscribed for twenty five shares of stock in the Roanoke Navigation Company,

Dec. 1831.

Robards v. Wortham.

upon which he paid $65 per share, leaving $35 on each share unpaid at his death.

By his will, of which he appointed the plaintiffs executors, he devised as follows:—

"I give and bequeath to my beloved wife *Delphia* the "land whereon I now reside, with all the appurtenances "thereunto belonging, known by the name of Potter's "Bridge plantation, to her and her heirs forever.

"I give and bequeath to my beloved wife the following negro slaves, (thirty in number). I give my wife "all my household and kitchen furniture, and all my "live stock of every kind whatsoever, and all my plantation tools and utensils, such as waggons, carts &c.

"I give and bequeath to *Mary H. Wortham* my negro "woman *Rhody* and her son *Burrel*, to her and her heirs "forever.

"I give and bequeath to *James L. Wortham* my three "stills, and my library of books of every sort, and my "blacksmith's tools now in his possession.

"And as to my just debts I would have them paid as "soon after my decease as can with convenience be done, "and for that purpose authorize and request my executors hereinafter named to sell my two tracts of land, "one lying on Nap of Reed's Creek, &c. one other tract "of land in Halifax County, Commonwealth of Virginia, "lying on Little Blue Wing. Should not the proceeds "of the land be sufficient to pay my just debts, that my "executors sell other property such as my wife shall "direct, to complete the payment of my debts. And it "is my will and desire, that should an overplus remain "of the proceeds of the sales aforesaid, then the same "shall be and remain with my wife, to her and her "heirs forever."

After his death the directors of the Navigation Company obtained a judgment against the plaintiffs, his executors, for the sum of $1124 96, being the balance of principal and interest due on his subscription, and upon the payment of the amount of the judgment, issued a certificate that "the late *John Washington* is the owner of "twenty five shares of the capital stock of the Roanoke

"Navigation Company, on which has been paid one "hundred dollars per share."

The plaintiffs in their bill averred, that the fund created by the testator for the payment of his debts, had proved insufficient for that purpose, and alleged that the stock, being real assets, had descended to the wife of the defendant *James*, who was the only child of the testator, and prayed that it might be subjected to the payment of the debt, in exoneration of the specific legacy to the plaintiff *Delphia*.

The answer admitted all the facts above stated.

Badger and *Devereux*, for the plaintiffs, argued that the real estate not devised is to be first applied to the payment of debts, as between the heir and devisee; and also as between the heir and specific legatee. (*Bland* v. *Lamb* 5 *Mad.* 412 *S. C. Jac. & Wal.* 399 *Galton* v. *Hancock* 2 *Atk.* 424 *Aldrich* v. *Cooper* 8 *Ves.* 393 *Bishop* v. *Sharp* 2 *Freem.* 276 *Lutkins* v. *Leigh Cases tempore Talbot* 53 *Oneal* v. *Mead* 1 *P. Wms.* 693 *Rider* v. *Wager* 2 *Id.* 335 *Tipping* v. *Tipping* 1 *Id.* 370 *Davis* v. *Gardiner* 2 *Id.* 189 *Fenhoulet* v. *Passavant Dick.* 253 *Bonner* v. *Bonner* 13 *Ves.* 379 *Jeremy's Eq. Juris.* 539).

Nash, *contra*, cited *Taitt* v. *Northwicke* 4 *Ves.* 816 *Giffins* v. *Steele* 1 *Swanst* 28 *Bootle* v. *Blundel* 1 *Mer.* 216 *Milnes* v. *Slater* 8 *Ves.* 305 *Barnewall* v. *Cawdor* 3 *Mad.* 453 *Stephenson* v. *Heathcote* 1 *Eden* 37 *Doe* v. *Micklem* 6 *East* 492 *Mellish* v. *Mellish* 4 *Ves.* 45 *Hancox* v. *Abbey* 11 *Ves.* 179 *Tregonwell* v. *Sydenham* 3 *Dow* 194 *Wilkinson* v. *Adam* 1 *Ves. & Bea.* 422 *Manning* v. *Spooner* 3 *Ves.* 114 *Leigh* v. *Leigh* 15 *Ves.* 103 *Hawes* v. *Warner Freem.* 277.

RUFFIN, Judge.—Descended lands must pay all debts for which the real estate is liable, in exoneration of all but residuary legacies, or of other lands specifically devised for the payment of debts. And if the creditors go upon the personalty, the legatees may have an indemnity out of the realty. This is an old rule of the court of chancery. (*Ch. Ca.* 2 *pl.* 4.) It is founded on this: that a man who is able to pay all his debts, and has some-

Descended lands must exonerate a specific legatee from the payment of all debts, for which the heir is bound.

DEC. 1831.

ROBARDS v. WORTHAM.

thing over to give away, may give it as he chooses. He cannot indeed restrain the creditor from resorting to any fund made liable to him by law. But if the creditor will, through mere caprice or convenience, go upon that fund which the testator meant for a particular donee, instead of that other left open alike by the law, and the testator for his satisfaction, the donee shall be re-imbursed out of the latter. And as to debts due by specialty in which the heir is bound, this principle has been extended to the protection of pecuniary legatees—much more specific legatees. (*Hanby* v. *Roberts*, *Amb.* 127. *Galton* v. *Hancock*, 2 *Atk.* 430. *Aldrich* v. *Cooper*, 8 *Ves.* 396.) If therefore the heir be made to pay such a debt, he may reinstate himself out of the executor, if there be a residue; because both at law and in this court, that is liable before land; but if there be no residue, but only things given away in legacies, he cannot, but must rest under the burden. *E converso*, if such legacies be applied to the discharge of such a debt, the legatee shall be reinstated by standing in the place of the satisfied creditor. (*Hanby* v. *Roberts*.) It follows, that in no case in England, can the legatee be reimbursed out of the land for a simple contract debt, paid out of his legacy; for the heir was not liable for that to the creditor, to whose rights and remedies only is the legatee substituted. It is the same here; because simple contract creditors can have recourse to the land only after exhausting the personalty, and therefore the legatee cannot ask the land to replace that personalty—which would be an absurdity, as was held in *Miller* v. *Johnson*. (3 *Murph.* 194.)

The devisor cannot restrain the creditor from subjecting the personal estate; but where the latter has a right to resort to both the personal and real assets and exhausts the former, a legatee will be substituted to the rights of the creditor against the heir.

If the heir pay the specialty debt of the ancestor, he may indemnify himself out of the residue of the personal property.

But the legatee cannot be indemnified out of the real estate, unless the debt paid by his legacy be a charge upon the heir.

This is a debt by simple contract, as the subscription does not purport to have been made by deed, and the charter does not make the heir liable. Merely as a debt then, it would not entitle the plaintiff to relief.

And a subscription to the stock of the Navigation Company being a simple contract debt, the legatee on payment of it, has no right to indemnity from the real estate.

But the charter expressly makes the stock, as well as the person of the subscriber, liable for a balance due on it. It is a legislative mortgage, which creates a specific lien. (*Rev.* c. 959, *s.* 1, 8.)

In that case, the heir or devisee of the land has the same right to ask exoneration out of the general residue

of the personalty, as he had in the case of the specialty, unless the ancestor or devisor was a purchaser of the estate, while under the incumbrance; for residuary legatees are *ex vi termini* only entitled to the surplus after payment of debts. But in like manner also as before, specific and even pecuniary legatees are protected, or rather are to be indemnified. *Oneal* v. *Mead* (1 *P. Wms.* 693) is an instance of this, where the legacy was specific, and the mortgaged freehold devised. The devisee took it *cum onere*. *Rider* v. *Wager* (2 *P. Wms.* 335) and *Tipping* v. *Tipping* (1 *Id.* 370) carry the rule to pecuniary legacies. In the former there were both specific and pecuniary legacies; and it was held, that neither should be defeated, but the devised land must pay the debt, with which it was specifically charged. Much more is this the case, where the land descends; for such lands are liable before estates devised, which are always specific. (*Ch. Ca.* 2 *pl.* 4.)

But the subscription creating a specific lien, and being the ancestor's debt, the heir has a right to an indemnity from the residue, and a specific legatee from the real estate.

The general maxim, however, that the personalty is, as it is sometimes called, the primary, and at others the natural fund for the payment of debts, has been much pressed; and many cases cited in support of it. Not one of them is denied; but they are misapplied. They relate to the case of land devised, *charged in the will* with the payment of debts. If indeed lands be devised *to be sold* for the express purpose of paying debts (as is here directed about the Blue Wing and Nap of Reeds land) and the surplus given away as money, there can be no doubt they are first liable, even as between them and a residuary legatee, unless some express interest is given to another in the land fund. For the residue is not given there in its general sense, after payment of debts; but it means the residue of the personal property after taking out such parts as are before given away. But where lands are merely *charged*, a question arises, are they to pay before or after the personalty? And the general rule is, that unless the contrary clearly—formerly, expressly—appear, the personal estate is to be first exhausted, and the real is only auxiliary; the charge being considered as an act of honesty in the testator, to

Where land is devised to be sold for the payment of debts, and the surplus given away as cash, it is primarily liable, even betwen the heir and the residuary legatee.

But where land is charged with the debts, it is taken as only auxiliary to the personal estate, unless the contrary clearly appears to have been the intention of the tes-

Dec. 1831.

Robards v. Wortham.

have his debts of all sorts certainly and speedily paid; and not to change the fund in the first instance, to which resort is to be had. The law fixes the burden on the personalty, and that can only be altered by the testator. And the intention on his part to alter it is not inferred upon slight grounds. Charging the land is not sufficient. However anxiously it is done, that will not of itself, have the effect of exempting the personalty, says *Lord Rosslyn*, in the case cited of *Taitt* v. *Northwick*. And *Lord Thurlow* says, in *Samwell* v. *Wake* (1 *Bro. C.* 144) and at several other times, that the testator must not only charge the real estate, but must show his purpose that the personal *should not* be applied, before the latter will be exempted. Many minute criticisms on wills have been made, to ascertain the intention in this respect. The final result of the discussions has been, that unless the personalty, altho' specifically bequeathed, be expressly or clearly exonerated by other parts of the will, a charge upon the lands will not have that effect. The reason is, that after one fund becomes fixed with the debts or a particular debt, that fund can be relieved only by plain words postponing its liability, and substituting another fund in its place. A *general* charge will not do; because that may *as well* be considered the creation of an additional fund, in aid of that already liable, as the provision of a sole fund for the payment of debts. But it is entirely different, where the personalty is specifically bequeathed, and the lands *descend*. So essentially different are the cases, that I should not have felt bound to notice at large those cases of a *charge*, but for the purpose of exhibiting clearly their leading principle, which, in another point of view, has an important application to this case, adverse to the defendant.

That principle is, that the order of liability once existing between two funds can be changed only by the intention of the testator; and to show such intent, express or plain words are indispensable, so as to make the intent manifest.

Where lands descend, they, as well as the personalty, constitute a primary fund for the satisfaction of speci-

alty debts and specific liens. And the testator, by giving away the personalty by specific bequests, is held to show his intention, that the land shall bear its own burden, unassisted. Hence that may be called the order, in which by law those funds, thus situated, are to pay. That order will not be disturbed but upon a plain intent: as if the land be devised to the heir. He takes indeed as heir, because the better title. Yet as denoting the intent, he shall for this purpose be considered as a devisee: who always holds exempt from debts, until *all* the personalty is exhausted, unless the devise be for payment of debts, or there be a *charge* in terms, which place the land in front of the personalty. No doubt, the whole is under the testator's control; and he may even effectually declare, that lands descended shall be eased by his general personal residue, or even his particular legacies. But it will be admitted by every one, after considering the before mentioned cases, and the principle on which they are founded, that to do that, the words must be indeed strong.

It is argued, that those in this will are sufficient. There is no residuary clause. That fund is therefore liable. The will gives to the wife the land on which the testator lived, a considerable number of slaves by name, his furniture, his stock and plantation utensils. There is then a specific legacy to his niece *Mary* of two slaves, and some other small specific legacies. The testator then directs his debts to be paid as soon as possible, "and for that purpose," he says, "I authorize my executors to sell two tracts of land lying &c. and should not the proceeds of the land be sufficient to pay my debts, then that my executors sell other property, such as my wife shall direct, to complete the payment." And he gives the surplus of the sales of the land, if any after payment of debts, to his wife. The argument is, that here is a direction to sell of the wife's legacy to supply any deficiency of the lands. That it must be of that legacy, because she is to point out the property—otherwise, she might defeat the other legatees by taking theirs. The position is thus far correct. For upon the deficiency of

Real assets in the hands of the heir as well as personal estate are the primary funds for the payment of specialty creditors & specific liens; and by specifically bequeathing the personal estate, the testator declares his intention that the land shall bear its own burden

So by a devise of the land the testator declares his intention to exempt it, and hence a devise to the heir prevents the land from being subjected in exoneration of the specific legacies.

It is a question of intent; but to change the order of liability requires a clear expression to that effect.

And where the testator devised land to be sold for the payment of debts, and gave the surplus to his wife, and also gave her a large legacy and small legacies to others, and directed his executors, in case of a deficiency of the fund for the payment of debts, to sell

Dec. 1831.

Robards v. Wortham.

such property as his wife might point out, it was held, that this direction charged the wife's legacy as between her and the other legatees, but did not exonerate descended real estate.

the funds provided, the legacies to the wife and others would abate. That the testator did not mean; but as between themselves, that the wife's legacy should pay the debts. And this is all that he did mean. When it is put, that he intended also that the wife should pay all the debts out of her legacy, in exoneration of lands descending *cum onere*, the argument fails. There is no reason for giving the words that sense—much less a reason from the expression of a clear, manifest intent. The words are satisfied without that. We see why the wife is directed to pay, in favor of the legatees; because but little was left to them; because uncertain whether the sales of the land would not discharge all debts, and the surplus of them is given to her. It might as well be argued, that this special direction—upon the score of intent—relieves the general residue for the benefit of the next of kin, as the descended lands for the benefit of the heir. We are not speaking now of the rule between those funds as established by law, but of the substitution by the testator of another fund in ease of both. As far as his words go, they denote his purpose to exempt one as much as the other. But other reasons were in the testator's mind; partly in favor of the small legatees, to ease their legacies; and partly in favor of the wife, to restrain the general power of the executors to sell any part, and give the selection to her. How then, following *Lord Thurlow*, can we say, here is a declaration that the real estate descended (being the fund before *fixed*) *shall not* be applied? The words were used for a different purpose, and were satisfied without this. Consequently there must be an account, to ascertain whether the personal estate not given away and the proceeds of the land sold have been administered; and the stock being real estate by the charters and descended, must be declared subject for any deficiency of those funds for the payment of the balance due for the stock, or of debts by specialty in which the heir is bound.

Per Curiam.—Declare that the balance due on the original subscription is a specific lien on the stock; and that it is liable to refund to the plaintiffs that part of the

subscription which they have paid, unless the undisposed of residue of the personal estate, and the proceeds of the two tracts of land devised for the payment of the testator's debts, be found inadequate to pay for the said stock and all the other debts of the testator; and direct a reference as to the sale of those lands, and an account of the undisposed of residue and of the administration of the plaintiffs; and let the clerk, in taking said account, distinguish such debts as were due upon specialties wherein the heir was bound.

HUGH L. WILSON v. MOSES WILSON *et al.*

Where a testator directed the interest of one third of the valuation of his slaves to be paid to his son, and requested another son to take the slaves and pay the valuation to his executors, and appointed that son and another his executors—Held, upon the probate of the will by the son alone, and upon his electing to take the negroes under the will, that he might retain the value of the negroes, and that they were not bound as a security for the annuity.

The bill was originally filed in Lincoln. The plaintiff alleged, that *David Wilson*, his father, died in September 1820, having, after sundry other legacies, provided as follows:

"I will unto my son *Samuel Wilson* one third part of "the valuation of all my negroes.

"I will and bequeath unto my son *Moses Wilson*, (the "defendant,) one third part of the valuation of all my "negroes.

"I will that the other third part of the valuation of "my negroes be placed in the hands of my executors, "for the support of my son *Hugh L. Wilson*, (the plain-"tiff,) and my executors to pay the interest of the a-"mount annually during his life, then the principal to "be equally divided among my children *Samuel*, *Wil-"liam* and *Polly*. It is also my request that my son "*Moses* take the negroes that may be valued for the "support of *Hugh L. Wilson*, and pay the valuation into

Dec. 1831.

WILSON v. WILSON.

"the hands of my executors"—and that he appointed the defendant *Moses* and another executors; that *Moses* only proved the will; that after the death of the testator the negroes were divided, when two girls were allotted for the support of the plaintiff; that the defendant *Moses* never had paid the valuation of those negroes to any person in trust for the plaintiff; that because of the renunciation of the other executor there was no person to whom it could be paid, and that therefore the defendant *Moses* held the slaves in trust for the plaintiff; that the defendant *Moses* had never paid the plaintiff any of the hire of the negroes, but had become insolvent, and for a nominal consideration had sold the slaves to the other defendants, who had notice of the plaintiff's claim. And the prayer was, that another trustee might be appointed in the room of the defendant *Moses*, and the other defendants be compelled to reconvey to such trustee; and also for an account of the hire of the slaves and for general relief.

The defendant *Moses*, in his answer, set forth a valuation of the negroes of the testator, whereby two female slaves, the eldest of which was not five years old, were allotted to the plaintiff at $420, one third of the whole value being $373 33. The defendant insisted, that upon the true construction of the will, he was only responsible to the plaintiff for the interest upon the latter sum for his life; and he averred, that on the 24th of October, 1821, he for a full and fair consideration purchased of the plaintiff his interest in this annuity. The sales to the other defendants were admitted.

A general replication was taken to the answer, and the plaintiff filed proofs tending to impeach the fairness of the release set up by the defendant. A gentleman of the bar, who drew up the release and attested its execution by the plaintiff, deposed, that at its execution the plaintiff was perfectly competent to make any bargain; that he, the witness, took the plaintiff aside, and cautioned him against executing the release, which was disregarded by the plaintiff.

Hogg, for the plaintiff, contended, 1st. That the defendant *Moses* was a trustee under the will of his testator for the plaintiff.

2d. That the release, from the relation subsisting between the parties, was a nullity.

Devereux, for the defendants, urged that the release was a bar to the claim of the plaintiff, and that it could not be impeached except upon a bill averring fraud in obtaining it; and that all the proofs filed impeaching it were irrelevant to the issues, as the only enquiry was whether it had been executed. (*James* v. *McKernon*, 6 *John. R.* 543.)

RUFFIN, Judge.—The bill assumes as the construction of the will, that the negroes are bequeathed to the plaintiff; at least, that they are bequeathed to *Moses* in trust for him. If that were true, the defendants who purchased from *Moses*, with knowledge that he claimed the slaves under his father's will, would hold them subject to the trust declared in it. But I think it plain, that the testator meant a sale of those slaves, which should be allotted as the third provided for the plaintiff's support. He says, that "one third of the *valuation* of his slaves shall be placed in the executor's hands for *Hugh's* support." This is inaccurately expressed; but means that the executors should get and keep the value of those slaves in their hands. Then they could not keep the slaves themselves. But this is rendered clear by the further provision, "that the executors are to pay *Hugh* annually during his life the *interest of the amount*" —not the hire of the negroes and their increase. And then comes a disposition of the fund after *Hugh's* death, which is not of the negroes, and their increase, but of "the principal," to be divided among three other children. If the will had stopped here, there could be no doubt that it would have been the duty of the executor to sell the negroes, and put the money at interest for a life annuity to the plaintiff. Is this altered by the subsequent provision? That provision is expressed by way of request, that the defendant *Moses* should take those

Dec. 1831.

Wilson v. Wilson.

negroes, valued for the support of *Hugh*, and pay the valuation into the hands of the executors; and *Moses* and another are appointed executors, of whom the former alone proved the will. It is argued, that if a sale was intended, a case has happened in which it was not so meant, and could not be made; because there was nobody who could sell to *Moses*, nor to whom he could pay the price. No act was necessary to complete the sale to *Moses*, but his own assent. The testator had already provided for that and the terms; namely, that the negroes should be valued; which was only necessary in case *Moses*, being an executor, should take them under the bequest in the will. There is no complaint of an improper division, or unfair valuation. That would be a distinct ground of relief, if it existed. But the bill affirms the division and valuation, and seeks the specific negroes allotted for *Hugh*. The meaning of the request to *Moses* to take those negroes could not be, that he should hold them upon terms different, and with a less perfect and disposable interest than another purchaser. If he would not keep them himself, he might and ought to sell them, by the terms of the will; and in that case, the purchaser would take them absolutely, and subject to no trust. If he kept them, why should his interest be less, or his title not as perfect? It is said, because he was executor. Not so. That might be a reason why they should be valued to him, and not to another; but none at all, why he should not have an indefeasible title, when he took them at valuation. The testator trusted him without security with the price, if sold to another. There seems to be no reason why he should not equally do so with the price in his own hands. I speak now of the meaning of the testator himself. Indeed had the other executor proved the will, the defendant *Moses* would have been as much entitled as he, to keep the price of the negroes. The intention then seems to be, to sell those negroes to provide a certain support for *Hugh* by placing the value at interest. And this is the more reasonable inference, when we find by the proofs, that there were only five altogether, and that four of them were of little service

The two, that were allotted for *Hugh*, were young females, the eldest of which was not five years of age, and would have been expensive for several years, instead of yielding any thing towards the plaintiff's maintenance. But the testator wished the slaves to remain in his family, if his son was willing and able to buy them. This he requested him to do; but that request did not constitute a trust of the slaves, if the son took them as his own. The will is to be construed as a mode of proposing a sale, and not as incumbering the property with a trust, or embarrassing the purchaser in the disposition of it. Such a purpose would be inconsistent with the apparent strong desire that *Moses* should take them. For what more likely to prevent him, than attaching such a trust to two slaves of their age and sex?

The interest of the defendant *Moses* must be declared to be an absolute one, if he assented to the purchase at all.

That he made an election in a reasonable time, and fairly, is placed beyond doubt by the contract and release executed to him by the plaintiff. The testator died in September 1820. The negroes were divided and valued October 25th, 1820. And on the 24th October 1821, the plaintiff by his deed, in consideration of $ 107 50, released to his brother "the annuity" bequeathed by his father, and in his hands as the executor. From this it must be concluded, that at that time it was perfectly understood, that *Moses* had taken the negroes as his own property, and that all parties understood him to be responsible for the value. Upon the matter of the bill therefore, touching any trust in the slaves, it must be dismissed as against all the defendants.

The bill however charges the insolvency of the executor, and prays general relief; which may be considered as a prayer to secure the fund and the annuity, if a proper case appears.

In the answer, the release of October, 1821, is specailly set up as a bar against this demand. While it remains in force, it is an absolute bar. Nor can it be annulled, but upon a bill expressly impeaching it upon the ground of fraud, unless upon its face or from the rela-

Dec. 1831.

WILSON v. WILSON.

tion of the parties, the court can declare it void. The fair execution of this instrument is proved by both of the subscribing witnesses; one of whom, an attorney, prepared it at the instance of the plaintiff himself. Other evidence has been taken by the defendant, going to show, that the agreement on which it was founded, was *bona fide* and fair; and the plaintiff has offered no proof to impeach it. If therefore the decision turned on the merits of the release, there seems to be no reason to suspect it upon the present state of the proofs. But the court does not enter into that; because the pleadings do not impeach it; and the only matter in issue upon it is that made by the answer and replication, which is the fact of execution. The plaintiff cannot therefore offer proofs in this case impeaching the release; nor can the depositions of the defendant tending to sustain it be considered; because the whole is out of the pleadings. If the witnesses have sworn falsely, they have not been guilty of legal perjury, since they have been interrogated to facts not stated in the bill or answer, nor in any manner put in issue. The court cannot hear the proof; it would be error if we did. (*James* v. *McKernon*, 6 *Johns.* 543. *Lyon* v. *Tallmadge*, 14 *Johns.* 501.)

Where the answer sets up a release as a defence to the matter stated in the bill, and the plaintiff replies generally, he cannot at the hearing read testimony impeaching the release as fraudulent.

No interrogatories can be put to witnesses, which do not relate to some fact in issue between the parties; and testimony as to facts not stated in the bill or answer is to be rejected.

The relation between these parties was not such as to prohibit their bargaining altogether, and invalidate every treaty between them, however fair and advantageous to the plaintiff. The relation makes a dealing suspicious, and imposes the burden on the executor of showing very clearly, that no advantage has been taken by him. The release is not therefore void, without proof *aliunde*. No proof has been, or could be offered here. The release must therefore be established as a bar to this bill. But because the circumstances, on which its validity depends, are not open in this suit, the bill will be dismissed, without prejudice to filing another for the security or recovery of the annuity, and impeaching the release.

PER CURIAM.—DECREE ACCORDINGLY.

Dec. 1831.

JOHN HEATH v. JOHN COBB.

Where a judgment was confessed to the prosecutor by a prisoner confined in jail on a charge of larceny and arson, under circumstances which induced the court to enjoin it, but without any misconduct on the part of the prosecutor, it was held, that it should stand as a security for the amount which might be recovered in another action to be brought by the prosecutor for the same trespass.

The bill was filed in Lenoir, in 1826, and alleged that the plaintiff being old, infirm and poor, was falsely accused by the defendant, a man of wealth and influence, of stealing cotton, and afterwards burning the gin house to conceal it—that being arrested on this charge, and unable to find sureties for his appearance, he was confined in jail from the 10th of August 1825, until the commencement of the term of the Superior Court, in October ensuing—that during this period, the defendant, by his agents, informed him, that if he would confess a judgment for $ 150, it should not be enforced, if he, the plaintiff, suffered corporal punishment in consequence of the prosecution—that believing from this proposition, that the defendant would not only abandon the prosecution, but wished him so to understand it, in consequence of his poverty, his forlorn situation, and his imprisonment, he consented to do so; and being brought into the court-house from the jail, confessed the judgment. The plaintiff then averred his innocence, and that the grand jury, after examining the witnesses for the prosecution, *ignored* the bill of indictment against him. The prayer was for an injunction against the judgment.

The defendant in his answer, insisted, that the plaintiff was guilty of the theft with which he was charged, and that while awaiting his trial, frequently made application to him to compound the prosecution, and offered to pay him $ 250, the estimated amount of his damages, which the defendant positively refused—that after repeated solicitation, he consented to permit the plaintiff to confess the judgment mentioned in the bill, in satisfaction of the damages he had sustained. But the defendant positively denied, that he ever promised the

Dec. 1831.

HEATH v. COBB.

plaintiff that the judgment should not be enforced, in case corporal punishment was inflicted upon him, or that he ever gave the plaintiff to understand, or any reason to hope, that the confession of the judgment should in any way affect the criminal prosecution.

A replication was filed and testimony taken, which is stated in the opinion of his Honor, Judge HALL.

Mordecai, for plaintiff.

Gaston, for defendant.

HALL, Judge.—It appears from the testimony in this case, that the plaintiff was a principal actor, in selling the cotton that had been stolen from the store-house of the defendant. From his advanced age, it is not very likely that he participated in fact, in the arson which was committed to conceal the theft. But it is more than probable, that he was privy to it. All the circumstances of the case form a mass of evidence against him, of a very suspicious character. Being in this predicament, it is necessary to ascertain, whether he confessed the judgment to the defendant under a sense of justice, and with a view to make remuneration for the injury done him, or whether he did so from the influence of fear or apprehension, arising from the prosecution then pending against him; and with a hope that the due course of law might thereby be averted; and whether the latter expectation was not cherished by the overtures made to him by the defendant and his agent.

Freed from all restraint, it is not very likely that a man, whose conduct has been represented in so criminal a point of view, should in the course of a few weeks return to a sense of reason and justice, and voluntarily make amends to the injured party for a crime that he had committed, and thereby tacitly acknowledge that he was the author of it. The defendant's first object seems to have been, to be compensated for the loss he had sustained, rather than bring to punishment an infirm old man. In the first, he was governed by a sense of justice due to himself. In the latter, his humanity might have been predominant. He forebore making any set-

tlement with the plaintiff, owing to an apprehension that its interfering with the prosecution against the plaintiff, might make it a nullity. But he took counsel, and was advised that he could not compromise the prosecution; but that if the plaintiff was found guilty, he could say, that he would not crave a judgment against him. To this he assented; and of this the plaintiff was informed by the defendant's agent *Blount*, whilst he was in jail. Connected with this part of the case is the testimony of *Daniel Daughtry*. He says that *Blount*, the defendant's agent, told him to tell the plaintiff, that if he would come into court, and confess judgment for $150, that he should have a credit of twelve months; and that if he suffered any corporal punishment, the judgment should be void. *Daughtry* states, that he made this known to the plaintiff, and that the plaintiff asked his advice. He, *Daughtry*, told him he did not know what would be sworn against him. Plaintiff said it might be best to confess a judgment, for he was fearful of false swearing. *Daughtry* then informed *Blount*, that the plaintiff was willing to confess a judgment. To a question asked *Blount*, he said, he did not *recollect* having such coversation with *Daughtry*, but he does not say, that such conversation did not take place. He states himself however, that he told plaintiff, if he was found guilty, the defendant would not crave judgment against him. *Frederick Jones* says that *Daughtry* came to *Blount*, and wished a compromise of *Heath's* business. *Blount* told him, that if he would give $250, and leave the state or county, he would do so. *Daughtry* then asked, what would become of the prosecution? *Blount* answered, he would see to it, or attend to it. *John Stephens*, who seems to have been a fellow prisoner of plaintiff, says, that *Blount* went into the jail as often as twice, and proposed to the plaintiff to make up for a certain sum, and told him that he would not see him take the whipping he would have to take, for twenty dollars.

From this evidence, the impression on my mind is irresistible, that the judgment was confessed under the influence of a hope held out by the defendant *Blount*, either

Dec. 1831.

HEATH v. COBB.

that the due course of law would be averted, or that if it was not, and the plaintiff was punished, the judgment should be of no effect. No doubt the plaintiff may owe, and in justice ought to pay to the defendant the amount of the judgment confessed. But individual justice to the defendant is not to be preferred to the public justice that is due to the community. Sound policy forbids it; and the prosecution against the plaintiff may be some proof why it should forbid it. For the defendant says, that although the testimony appearing in this case was presented to the grand jury, they found the bill not a true bill, as he supposed, through humanity to the aged prisoner. Might it not have been too, through a favorable impression made upon the jury by the prosecutor, after the confession of the judgment to him?

I think the defendant ought to be enjoined from proceeding on, or making any use of the judgment complained of. But it may be held as a security for any amount, which the defendant shall hereafter recover against the plaintiff. And the plaintiff is enjoined from pleading the statute of limitations, in any suit that may be brought by the defendant, to recover the amount, due on account of the subject matter, for which the judgment was confessed.

RUFFIN, Judge.—The evidence satisfies my mind, that the judgment was confessed by the plaintiff for the sake, at least, of softening the prosecutor. It is not alone for the agreed damages for the civil injury. Nobody can believe, that such a security would have been given, had the indictment been at an end. The judgment is the original security given, and is therefore open for this court to act on, as a bond would be at law. The plaintiff was under a duress in the eye of a court of equity. He was in prison, charged with an infamous offence, and hoped to conciliate both the injured party and the court. Securities thus obtained ought not to be obligatory. Free consent is wanting. I do not put it on the ground, that the defendant or his agent practised upon the plaintiff's fears, or used improper means to influence

him. They acted as fairly as they could, and did nothing wrong, except in the single fact of taking a judgment from a man in the plaintiff's situation and state of mind. He was not in a condition to be dealt with, in reference to the act, out of which grew the criminal charge. He could not and did not stand upon his rights. He felt himself in the other's power, and with a spirit subdued, was willing to surrender them, without reference to the actual damage sustained by the defendant, and to yield to any of his demands, upon the hope, clearly entertained by him, that he would fare the better upon the prosecution. I think both upon the principle of the public policy, which forbids the compounding of prosecutions, and of duress as understood in a court of equity, the plaintiff must be relieved.

But as I by no means consider the defendant obnoxious to the censure of actual oppression or imposition; and as his loss, by the theft and the burning connected with it, are established beyond doubt; and as the participation of the plaintiff in the former act is clear, and that in the latter, probably to be inferred, I think the judgment is not forthwith to be perpetually enjoined. While the defendant cannot have full advantage of it, the court must take care, that he suffers no loss by it. During its existence, the defendant could bring no suit at law for the trespass. But the plaintiff is not to escape answering altogether for the trespass, and at the same time avoid the judgment in this court. The defendant may therefore have liberty to institute now an action at law, to establish the trespass alleged by him, and the damages sustained, in which the plaintiff shall not plead the statute of limitations: and the judgment must stand as a security for the damages, that may be assessed by the jury; and after the verdict, the parties have leave to move for further directions.

Per Curiam.—Decree accordingly.

Dec. 1831.

James Reeves v. Meredith Adams & Anderson Blackwood.

Arbitrators, officers of corporations and solicitors who have aided their clients to commit frauds, may be made defendants. But the rule is different as to a mere witness, who has no interest in the cause, and against whom no relief can be given. If he answers, the bill, at the hearing, will be dismissed as to him with costs.

The plaintiff in his bill, which was filed in Orange in 1826, sought to set aside the sale of a lot in the town of Hillsborough, made by the plaintiff to the defendant *Adams*, under circumstances of gross fraud. The relief as to *Adams* was clear, and the only doubt was, whether the defendant *Blackwood* was not unnecessarily made a party. As to him, the facts were, that he went with *Adams* to the house of the plaintiff, at the time when the latter was made drunk by the former, and when the deed for the lot was signed, which was witnessed by *Blackwood*, who endeavored to get a part of the purchase money to secure a debt due another person, in which he failed.

Blackwood submitted to answer, and at the hearing it was moved by *Nash* and *Winston*, that the bill should be dismissed as to him, urging that he had improperly been made a party; and for this was cited *McNamara* v. *Williams*, (6 *Ves.* 143). *Plummer* v. *May*, (1 *Ves. sen.* 426.)

Ruffin and *W. H. Haywood*, for the plaintiff contended, 1st, That *Blackwood* should have demurred if there was any thing in the objection; and 2d. That he was properly made a party; and for these positions they cited *Lingood* v. *Croucher* (2 *Atk.* 396). *Chicot* v. *Lequesne* (2 *Ves. sen.* 315). *Mitford* 152. *Bennet* v. *Vade* (2 *Atk.* 327). *Bowles* v. *Stewart* (1 *Sch. & Lef.* 227). *Cooper Eq. Pleading* 42 & 178. *Plummer* v. *May* (1 *Ves. sen.* 426). *Cookson* v. *Ellison* (2 *Bro. C. C.* 252).

The cause was held under advisement several terms.

The opinion of the court was delivered by

Hall, Judge.—It appears to be a general rule, that a person who is merely a witness shall not be made a party defendant; because having no interest in the cause,

no decree can be made against him, and because the party may have the full benefit of his testimony, by examining him as a witness. (*Plummer* v. *May*, 1 *Ves. sen.* 426. *Fenton* v. *Hughes*, 7 *Ves.* 287. *McNamara* v. *Williams*, 6 *Ves.* 143).

But to this rule there appear to be some exceptions. Arbitrators have been suffered to be made defendants. (*Lingood* v. *Croucher*, 2 *Atk.* 396. *Chicot* v. *Lequesne*, 2 *Ves. sen.* 315). Clerks of corporations may also be made defendants, for the sake of discoveries, because the answers of corporations are not upon oath, and are therefore not evidence. (*Wyche* v. *Meal*, 3 *P. Wms.* 310. *Moodaluy* v. *Morton*, 1 *Br. C. R.* 469. *Dummer* v. *Chipenham*, 14 *Ves.* 251). And *Lord Redesdale* has decided, that a solicitor, assisting his client in obtaining a fraudulent release, was properly made defendant, and liable for costs, if the principal was insolvent. (*Bowles* v. *Stewart*, 1 *Sch. & Lef.* 227).

In the present case, the defendant *Blackwood* appears to have no interest in the cause, and no decree can be entered against him. It was therefore unnecessary to make him a party. The plaintiff might have had the benefit of his testimony, without doing so. For these reasons, I am of opinion that he should be allowed his costs.

PER CURIAM.—Dismiss the bill as to *Blackwood* with costs.